AUG 27 1971
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 52, Original

UNITED STATES OF AMERICA,

Plaintiff,

-v-

STATE OF FLORIDA,

Defendant.

MEMORANDUM IN OPPOSITION TO MOTION BY THE UNITED STATES TO DISMISS THE COUNTERCLAIM AND DENY THE DEMAND FOR JURY TRIAL FILED BY THE STATE OF FLORIDA

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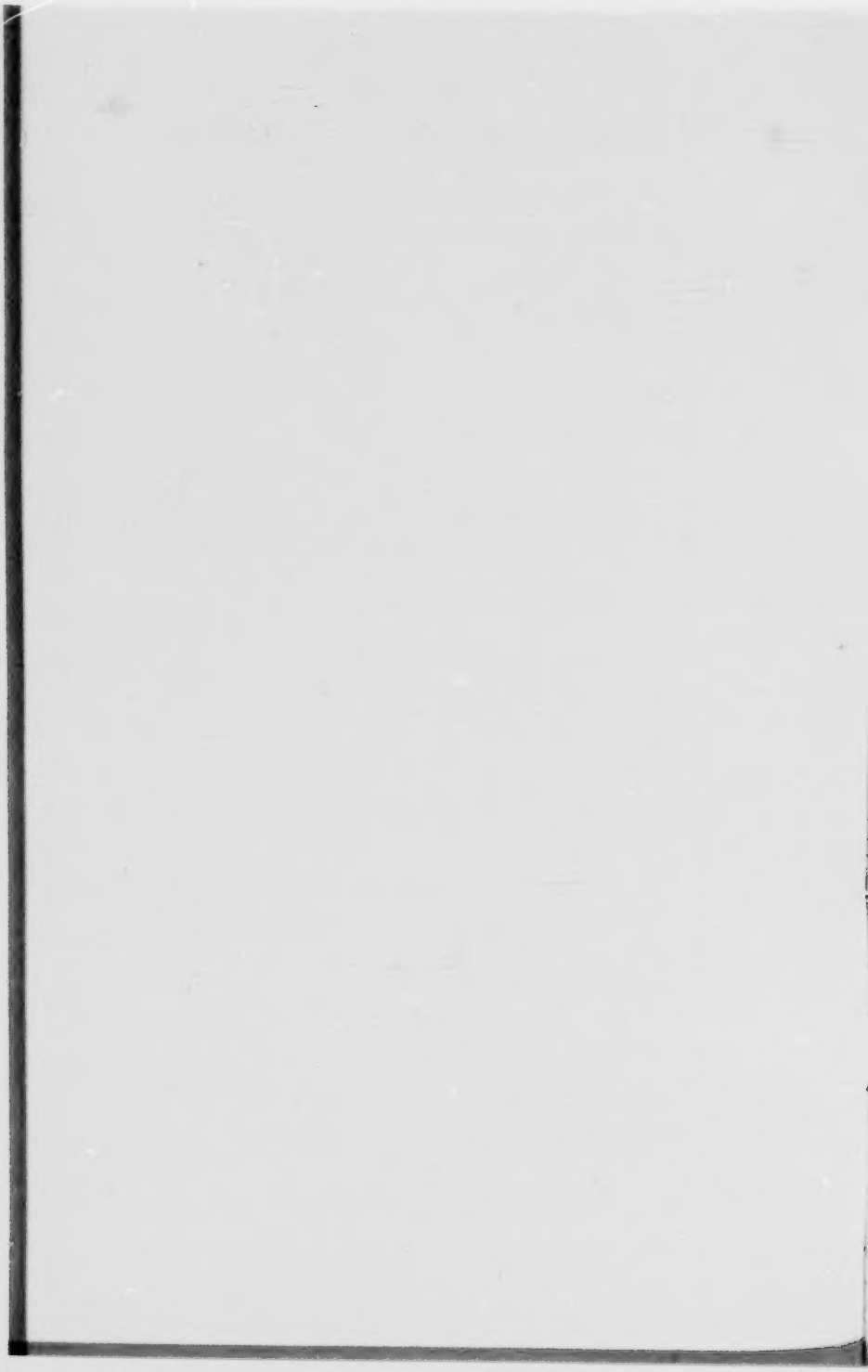

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INTRODUCTION

The Plaintiff, United States of America, has moved to dismiss the counterclaim herein filed by the defendant-counterclaimant, State of Florida. The counterclaim basically alleges that the Congress conveyed title to the submerged lands in question to the State of Florida in 1868 and that the United States is now seeking to take said lands without just compensation in violation of the Fifth Amendment. The United States has moved to dismiss

the counterclaim and to strike the demand for jury trial on the ground, inter alia, of its sovereign immunity.

The Defendant-counterclaimant (hereinafter referred to as "counterclaimant") initially wishes to emphasize what issues are not presented in this case with reference to the doctrine of sovereign immunity. First it should be made clear that counterclaimant does not contest the doctrine of sovereign immunity as it relates generally to tort or contract actions brought by private persons or entities against a government. This case involves an action by one "sovereign" against another on the ground of an alleged constitutional deprivation.

Moreover, counterclaimant does not even advance (nor do the facts of this case present a foundation for presenting) the question of sovereign immunity in an action initially filed by a private person, or even a State. This case concerns the right of a State to present its constitutionally-based claim as a counterclaim in an action instituted by the United States.

Finally, it should be kept foremost that counterclaimant does not even argue the right to advance "unrelated" constitutionally-based counterclaims. The counterclaim in this case concerns the same subject matter as the initial claim. See Rule 13(a), Federal Rules of Civil Procedure (compulsory counterclaims).

Counterclaimant thus submits that the following issue with reference to sovereign immunity is presented by the motion to dismiss, filed by Plaintiff:

WHETHER THE UNITED STATES MAY PLEAD SOVEREIGN IMMUNITY IN A SUIT AGAINST A STATE TO A COUNTERCLAIM ALLEGING A CONSTITUTIONAL VIOLATION AND DEALING WITH THE SAME SUBJECT MATTER AS THE ORIGINAL CLAIM?

I. ARGUMENT ON SOVEREIGN IMMUNITY

A. Sovereign Immunity Should be Abolished

> "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." O. W. Holmes, "Path of the Law," 10 Harvard Law Review 457, 469 (1897).

The doctrine of sovereign immunity was transplanted in our young republic from the early feudal days of England when no baron or lord was subject to suit in his own court. Eventually the doctrine became intertwined with the "divine right of kings" and was predicated on the fact "the king could do no wrong" (at least in this world). Various principles were later advanced in support of the doctrine, the foremost of which was the dogmatic assertion that the sovereign could not be held to answer for a violation of the law the sovereign itself had created (even though this latter proposition appears to

be of doubtful validity, in England at least, after the signing of the Great Charter at Runnymeade). See United States v. Lee, 106 U.S. (16 Otto) 196 (1882).

The vestigial remains of this corollary of the "divine right of kings" were swiftly (albeit unexplainedly) applied by American courts [aside from this Court's abortive demise of it in Chisolm v. Georgia, 2 Dall. 420 (1793)], with a dogmatic fervor, prompted, no doubt, chiefly by the imminent bankruptcy of the State and national governments in the days following the Revolution. See Watkins, The State As a Party Litigant, 52-54(1927).

The legal justification for this blind adherence to the archaic past never really was forthcoming, since "[t]o the Constitution of the United States the term sovereign, is totally unknown." Chisolm v. Georgia, 2 Dall. 420, 454 (1793) (Wilson, J.). Almost a century after Chisolm this Court again found itself at a loss to provide a legal justification for continued adherence to the doctrine, when it stated:

> "What were the reasons which Forbade that the King should be sued in his own court and how do these reasons apply to the political body corporate which we call the United States of America?
>
> ***
>
> "As we have no person in this Government who exercises supreme executive power or performs the public duties of a sovereign, it is difficult to

> see on what solid foundation of principle the exemption from liability to suit rests." United States v. Lee, 106 U.S. (16 Otto) 196, 206 (1882).

Even more important than the utter dearth of legal principles to support the doctrine generally are the compelling legal principles which call for its abolition in those instances wherein a State is alleging a constitutional violation on the part of the United States. Here any justification for continued adherence to the doctrine totally disappears since, unlike in feudal England where the law was the creature of the sovereign, "[t]he United States is entirely a creature of the Constitution," Reid v. Covert, 354 U.S. 1, 5-6 (1957) and all branches of national (as well as State) government are subordinate to it. Id.

Simply stated, under our system of government, it is the constitution which is the "sovereign" (until altered by the people). It is the constitution from which the power to create all laws flow. It is from the constitution (not the king) that this Court derives its authority to sit.

If there is any principle in our nation, where "no man is above the law," which should truly be considered as axiomatic, it is that "no government is above the constitution." This all-transcending document "is a law for rulers and people." Ex Parte Milligan, 71 U.S. (4 Wall.) 281, 294 (1866).

Illustration of this principle is found in those early cases wherein States, when

sued in this Court by the United States, sought to plead their sovereign immunity as a bar to the action. This Court rightfully rejected those pleas even though it could not point to any express waiver of such immunity. This Court reasoned that unless a State were held liable to such suits then it could commit all sorts of constitutional violations with impunity. In this Court's words:

> "The establishment of a permanent tribunal with adequate authority to determine controversies between the states, in place of an inadequate scheme of arbitration, was essential to the peace of the Union. With respect to such controversies, the States by the adoption of the Constitution, acting 'in their highest sovereign capacity, in the convention of the people,' waived their exemption from judicial power. The jurisdiction of this Court over the parties in such cases was thus established 'by their own consent and delegated authority' as a necessary feature of the formation of a more perfect Union.
>
> "Upon a similar basis rests the jurisdiction of this Court of a suit by the United States against a State, albeit without the consent of the latter. While that jurisdiction is not conferred by the Constitution in express words, it is inherent in the constitutional plan. Without such a provision, as this Court said in United States v. Texas,

> supra, 'the permanence of the Union might be endangered.'"
> Monaco v. Mississippi, 292 U.S. 313, 328-9 (1934). Accord, Minnesota v. Hitchcock, 185 U.S. 371, 386-7 (1902).

Counterclaimant soundly endorses this rule of law and, even more importantly, the compelling reasons which support it. Since no state is above the constitution, no state ought to be able to plead its immunity when brought to the bar for violating it.

However, the question redounds, is justice (in the constitutional sense) to be a "one-way street"? Do not these same compelling reasons dictate that the United States equally ought not to be able to plead its sovereign immunity in a suit by a State? If all States are under the constitution is not also the United States government under it?

Your counterclaimant would here concede that this Court in a decades-old holding appears to have rejected this argument. The Court there stated that,

> "It does not follow that because a state may be sued by the United States without its consent, therefore the United States may be sued by a state without its consent. Public policy forbids that conclusion."
> Kansas v. United States, 204 U.S. 331, 342 (1907).

However, one may read the entire Kansas decision (and subsequent similar decisions of this Court) and find not a

single "public policy" principle listed in support of the conclusion -- assuming, of course, that "public policy" may place a government above the constitution. Your counterclaimant submits that the paucity of reason or policy advanced to support the conclusion reached in Kansas is due to the impotency of it and that the Kansas decision ought to be re-examined and summarily rejected. The United States ought to be subject to suit in this Court by a State on an alleged constitutional violation.

What reasons exist for allowing suits against a State but not suits by a State against the United States (non obstante the plain wording of the constitution, which extends the judicial power of this Court to "all cases" Minnesota v. Hitchcock, 185 U.S. 371, 385 (1902) (court's emphasis) in which a State shall be a party)?

Can it be said that only the States and not the United States must function under the constitution? Surely, this is not so. Can it be said, as was done in feudal English courts, that the United States government is not subject to suit in this Court because this court owes its existence to it (as opposed to the constitution)? Surely, this is not so. Can it be said as a factual assumption that only States and not the United States government will exceed the bounds of the constitution? Surely, this is not so. See Ex Parte Endo, 323 U.S. 310 (1944); Korematsu v. United States, 323 U.S. 214 (1944) (Murphy, Jr., dissenting); Bolling v. Sharpe, 347 U.S. 497 (1954). Can it be said that such suits (alleged

constitutional violations brought by States) will be so numerous as to bankrupt the United States (assuming cost to be a valid criterion in constitutional rights area)? Surely, this is not so (in light of the "blanket" waiver of immunity on these actions in the Torts Claims Act).

Counterclaimant thus submits that it is "inherent in the constitutional plan" to bring the United States "before the bar" when the constitution is involved in a suit by a state. The quoted principles of Monaco v. Mississippi, supra, apply with equal force to this case and Kansas v. United States, supra, ought to be overruled.

Terminally, your counterclaimant submits that yet another reason why sovereign immunity should not bar this action is that it involves a counterclaim concerning the same subject matter as the original claim. It is the Plaintiff which has here invoked this Court's jurisdiction and which now seeks to escape it.

Again your counterclaimant must concede the existence of older decisions of this Court which appear to reject the proposition herein advanced. See, e.g., Illinois Central R.R. Co. v. Public Utilities Commission, 245 U.S. 495 (1918). Again, however, your counterclaimant must re-emphasize that these decisions totally fail to explain the reason for the conclusion reached.

These decisions appear to create an anomaly in that they are contrary to the

general principle that when the United States comes to Court as a suitor, it stands in the position of a private litigant Luckenbach S.S. Co. v. The Thekla, 266 U.S. 328 (1924). In the Thekla case the United States joined with admiralty action and then sought to avoid liability on a cross-libel by pleading sovereign immunity. This Court began its opinion by stating the general rule with reference to the status of the United States as a suitor, to wit:

> "When the United States comes into Court to assert a claim it so far takes the position that justice may be done with regard to the subject matter. The absence of legal liability in a case where but for its sovereignty it would be liable does not destroy the justice of the claim against it." 266 U.S. at 339-40.

This Court then proceeded to hold that the United States could be sued via the cross-libel and rejected the argument that statutory authorization for same was lacking, by stating:

> "It is said that there is no statute by which the Government accepted this liability. It joined the suit, and that carried with it the acceptance of whatever liability the courts may decide to be reasonably incident to that act." 266 U.S. at 341.

It must be conceded that in so holding, the Thekla Court placed particular emphasis upon the nature of the cause of action involved, i.e., an "in rem" action. Assuming, without conceding, that the instant action is "in personam" (since the ultimate question in this action is the determination of title to specific land areas), your counterclaimant submits that this factor logically should not materially alter the result.

First, your counterclaimant is unaware of any principle of law which states that the United States, as a suitor, binds itself to do justice only in admiralty (or in rem) cases. To state the possibility of such a rule of law is to uncover the absurdity of it.

Second, your counterclaimant was of the current legal opinion that, at least where constitutional claims are involved, "labels" do not count. In Re Gault, 387 U.S. 1(1967). In this regard it should be clear that the counterclaim deals with the same subject matter as the original claim (albeit seeking different relief) whether the instant action be labelled "in personam," "quasi in rem," or "in rem."

Third, it is clear that utterly none of the reasons originally advanced in support of sovereign immunity apply to actions on counterclaims. Here the sovereign (even in the divine kingly sense) is not being forced to enter his own courts, but rather, he has voluntarily subjected himself to their jurisdiction. So also, in these instances the "monetary" rationale (in those opinions bold enough to state this as a reason for immunity) disappears,

since a holding of liability here would not create the spectre of hundreds or thousands of "uninvited" lawsuits.

With respect to Plaintiff's immunity defense your counterclaimant simply asks this Court to remain true to the admonition of Mr. Justice Holmes and to recognize the Plaintiff's defense for what it is -- the vestigial remains of feudal English monarchial philosophy. Reason and the underlying principles of our system of government and justice dictate against application of the doctrine to the facts presented by this case. Only the echoes of the archaic past call for its application. The counterclaim of the State of Florida should be considered on its merits.

B. Sovereign Immunity Has Been Waived

Alternatively, the counterclaimant contends there has been an effective Waiver of Sovereign Immunity in this case.

Title 28 U.S.C. §1491, provides, inter alia, that the Court of Claims shall have jurisdiction to render judgements upon any claim against the United States founded upon the constitution; or founded upon any act of Congress. The counterclaim Sub Judice is clearly founded upon the aforestated bases of Jurisdiction of the Court of Claims.

It has long been held that the Court of Claims has jurisdiction of actions by the states against the United States for

demands arising out of an act of Congress and the constitution. U.S. v. Louisiana, 123 U.S. 32, 8 S.Ct. 17, 31 L.Ed. 69 (1887). Thus, Congress having waived sovereign immunity as to a state suing the United States in this forum, the only issue to be resolved is whether or not such an action could be maintained in the Supreme Court as well.

Title 28, U.S.C., §1251(b)(2) provides that the Supreme Court shall have original but not exclusive jurisdiction of all controversies between the United States and the states. It was held in U.S. v. Louisiana, supra, that the Supreme Court does not have exclusive jurisdiction of actions where a state is Plaintiff against the United States and that the Court of Claims has concurrent jurisdiction with the Supreme Court in these cases.

The Court of Claims having concurrent jurisdiction with the Supreme Court in original proceeding where a state is suing the United States, and the Court of Claims being per se a waiver of sovereign immunity, a fortiori, such waiver of sovereign immunity must logically extend to original actions in the Supreme Court.

The foregoing contention is fortified by the fact that by virtue of Title 28 U.S.C. §1255, the Supreme Court may review by Writ of Certiorari cases in the Court of Claims. The reviewing of cases wherein sovereign immunity has been waived is a waiver in itself. The Court of Claims, being a "legislative" court (U.S. v. Sherwood 312 U.S. 584, 61 S.Ct. 767, 85 L.Ed. 1058 [1941]), the "Judicial Power" of Art. III, U.S. Constitution, is not involved and Congress's provision for

review is a legislative grant and a discretionary waiver of sovereign immunity on review.

If this Court denies jurisdiction of the counterclaim, the anomalous effect would be to defer this action to the Court of Claims over which this Court has ultimate power of review; such a circuity of litigation is unwarranted because the facts of this case are presently before the Court.

Logically, if the Supreme Court can review cases involving the waiver of sovereign immunity or if the power to grant review on Petition for Writ of Centiorari is a waiver of sovereign immunity within itself, certainly the Supreme Court can entertain such actions as an original matter.

While perhaps the status of sovereign immunity should be clarified by legislation, counsel for the State implores the Court, pending such legislation, by interpretation to give the widest possible effect to statutes waiving sovereign immunity. Congress by statutes such as the Tucker Act, the Federal Torts Claim Act, and the Court of Claims has abolished sovereign immunity. We suggest the evident spirit of these laws should be carried out. Procedural anachronisms should not be employed to limit the liberal policy of such statutes. The Court may use as their guide the phrase inextricably linked with the history of English attempts to evade the tenacles of the immunity concept -- "Let right be done!"

II. CLAIM UPON WHICH FLORIDA IS ENTITLED TO RELIEF

Basically, the State of Florida contends, inter alia, that Congress, by act of June 25, 1868, 15 Statutes 73, approved Florida's marine boundary in excess of three (3) geographic miles in the Atlantic; thus, conveying all right and interest in title, the United States may have had in the submerged lands and superadjacent waters within such boundary.

The United States seemingly contends that the Submerged Lands Act limits the above stated grant to three (3) geographic miles in the Atlantic.

If the contentions of both parties are correct, the subsequent act of Congress works as a "taking" of property without just compensation in violation of the Fifth Amendment to the United States Constitution.

Counterclaimant concedes that if the Court agrees with its contention that the Act of 1868 was a grant or conveyance from the United States, and that the Submerged Lands Act has no limiting effect, that the counterclaim would be moot.

However, if the Court finds as a matter of law that the Submerged Lands Act limits Florida's claim or that any holding of this Court, past or present, limits Florida's claim under the Act of 1868, then the counterclaim is viable and states a cause of action.

Therefore, the counterclaimant prays this Court will withhold determination whether vel non the counterclaim states a cause of action at this juncture of litigation.

While the counterclaim may seem precipitous, its presence in regard to final judgement is essential to the inclusiveness and conclusiveness of this matter. If the Court rejects the counterclaim at this time, it is possible that this Court will again be confronted with this matter on Petition for Writ of Certiorari from the Court of Claims; such procedure would be unnecessarily burdensome and expensive to the Court and to the parties.

III. THE DEMAND FOR A JURY TRIAL SHOULD BE GRANTED

Title 28 U.S.C. §1872 provides "In all original actions at law in the Supreme Court against citizens of the U.S., issues of fact shall be tried by a jury."

Florida contends this statute entitles it to a trial by jury. The United States contends that it does not, because a state is not a "citizen."

The absurdity of the movant's contention is best illustrated in its Memorandum in Support of Motion. The movant claims on Page 6 of said Memorandum in regard to sovereign immunity that "[t]here is no reason why this rule, [Government's immunity extends to counterclaims] like the prohibition on initiating suits, should not apply equally to suits by states as to suits by individuals. On Page 9 of said Memorandum the movant states "[t]he State of Florida cannot be construed to be a 'Citizen' under the terms of Section 1872."

Counsel assumes the government's reference to an "individual" in reference to a "citizen."

Rather than take issue with the contradictions of movant's Memorandum, the counterclaimant contends that if §1872 does not provide for jury trials for the states, said section is unconstitutional in regard to the U.S. Constitution, Amendment VII, which states:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved..."

Alternatively, if §1872 does not provide for jury trials for the States, Florida relies on Amendment VII as a self-implementary provision of the Constitution to provide the right to a jury trial and demands the same.

Terminally, the government contends this "case" is not an "action at law." True, the complaint is in the nature of a quiet title action, but the counterclaim is an action at law insomuch as damages are demanded for an unlawful taking of property as alleged.

Juries are traditional in condemnation cases. The case at bar is similar in nature.

CONCLUSION

For reasons stated, the motion of the U. S. should be denied in all respects.

Respectfully submitted,

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HERBERT T. SCHWARTZ
Deputy Attorney General

W. ROBERT OLIVE, JR.
Assistant Attorney General

RONALD W. SABO
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32304

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of August, 1971, a copy of this Memorandum in Opposition to Motion by the United States to dismiss the counterclaim and deny the demand for jury trial filed by the State of Florida was mailed, postage prepaid, to Honorable John N. Mitchell, Attorney General of the United States, and Honorable Erwin N. Griswold, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530.

_____
W. ROBERT OLIVE, JR.
Assistant Attorney General

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973 No. 52 Original

UNITED STATES OF AMERICA,

Plaintiff

v.

STATE OF FLORIDA,

Defendant

Report of Albert B. Maris, Special Master

January 18, 1974

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107

TABLE OF CONTENTS

	Page
A. History of the Proceeding	1
B. The Questions Involved	6
1. The effect of Congressional approval of Florida's 1868 Constitution as approval of the State boundaries described therein	6
2. The effect of Congressional approval of of Florida's 1868 Constitution as a grant, express or implied, to the State of the proprietary right to the seabed and its natural resources within the boundaries described in the Constitution	8
3. The effect of the Submerged Lands Act of 1953	11
4. The dividing line between the Atlantic Ocean and the Gulf of Mexico	18
5. The location of the 1868 State boundaries	21
6. The location of the present State boundaries for the purposes of the Submerged Lands Act	32
7. The character and extent of Florida Bay as a juridical or historic bay constituting inland waters of the State	36
8. The location of the coastline of the State	47
C. Conclusions	56
D. Recommendations	60
E. Appendix	
Prehearing Order	61
Joint prehearing statement of the parties	68
Submerged Lands Act of May 22, 1953, 67 Stat. 29	75
Section of Coast & Geodetic Chart C. & G. S. 1113 [U. S. Exhibit No. 37]	84

TABLE OF CONTENTS—Continued

Page

Coast & Geodetic Survey Charts
[U. S. Exhibit No. 101]

C. & G. S. 1242—
Doboy Sound to Fernandina 86

C. &. G.S. 1243—
Amelia Island to St. Augustine 88

C. & G. S. 1248—
Jupiter Inlet to Fowey Rocks 90

C. & G. S. 1249—
Fowey Rocks to Alligator Reef 92

C. & G. S. 1250—
Alligator Reef to Sombrero Key 94

C. & G. S. 1251—
Sombrero Key to Sand Key 96

C. & G. S. 1252—
Sand Key to Rebecca Shoal 98

C. & G. S. 1253—
East Cape to Mormon Key 100

C. & G. S. 1351—
Sombrero Key to Dry Tortugas 102

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973 No. 52 Original

UNITED STATES OF AMERICA,
Plaintiff

v.

STATE OF FLORIDA,
Defendant

REPORT OF ALBERT B. MARIS, SPECIAL MASTER

A. HISTORY OF THE PROCEEDING

This proceeding involves the determination of the extent of the rights of the State of Florida, as against the United States, to the seabed and subsoil of the continental shelf seaward of its coastline on the Atlantic Ocean and the more precise determination than has heretofore been made of the extent of those rights seaward of its coastline in the Gulf of Mexico.

In this proceeding a claim of the United States for relief against the State of Florida which was originally asserted in the complaint filed on June 16, 1969 with leave of Court, 395 U.S. 955, in the case of the *United States v. the States of Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia and Florida*, No. 35 Original, and severed therefrom on June

28, 1971, 403 U.S. 949, has been consolidated with a supplemental proceeding which the Court on the same date, 403 U.S. 950, authorized to be initiated by the United States and the State of Florida in the case of the *United States v. the States of Louisiana, Texas, Mississippi, Alabama and Florida*, No. 10 Original. That case was subsequently designated as No. 9 Original and this designation will be used in this report. Briefly stated, the relief sought against the State of Florida in Case No. 35 Original, and which is now sought in this consolidated proceeding, is a decree defining the seaward boundary of the submerged lands of the continental shelf in the Atlantic Ocean in which the State of Florida has rights to the natural resources and beyond which the United States has those rights. The relief sought with respect to the State of Florida in the supplemental proceeding initiated in Case No. 9 Original and which is also now sought in this consolidated proceeding is a decree defining with greater particularity than is stated in the decree entered on December 12, 1960 in No. 9 [then No. 10] Original, 364 U.S. 502, the seaward boundary of the submerged lands of the continental shelf in the Gulf of Mexico in which the State of Florida has rights to the natural resources and beyond which the United States has those rights. By the decree of December 12, 1960 the Court determined that the State of Florida, as against the United States, is entitled to all the lands, minerals and other natural resources underlying the Gulf of Mexico extending seaward from its coastline for a distance of three leagues and reserved jurisdiction to entertain such supplemental proceedings as might from time to time be deemed necessary or advisable to give proper force and effect to the decree.

The complaint in No. 35 Original alleges with respect to the claim against the State of Florida that the United States is entitled, to the exclusion of the State, to exercise sovereign rights over the seabed and subsoil underlying the Atlantic Ocean seaward from the three-mile limit (within

which limit the United States has transferred its rights to the State by the Submerged Lands Act of 1953, 67 Stat. 29) out to the limits of the continental shelf for the purpose of exploring the area and exploiting its resources. The complaint further alleges that the State of Florida claims rights in the seabed and subsoil in question. Similar allegations are made in the complaint with respect to the twelve other Atlantic seaboard states and a declaratory decree is sought.

All the defendant states filed answers to the complaint. The State of Florida subsequently filed an amended answer. In its amended answer the State admits that it claims an interest in the seabed, subsoil and natural resources of the continental shelf in the Atlantic Ocean more than three miles seaward from its coast, but denies the other allegations of the complaint. An affirmative defense is set up by the State that by the Act of June 25, 1868, 15 Stat. 73, Congress approved the marine boundaries of the State described in Article I of its Constitution of 1868, which boundaries, it asserts, run more than three miles seaward from its coast in certain parts of the Atlantic Ocean, and that Congress thereby granted to the State whatever interest the United States possessed in the maritime territory within those boundaries. The amended answer further asserts that the body of water known as the Straits of Florida is an arm of the Gulf of Mexico or, in the alternative, that the Florida Keys and the Marquesas and Dry Tortugas Islands are located in the Gulf of Mexico and that the State is, therefore, entitled to a southern seaward boundary of three leagues from its coastline wherever located in this area. The affirmative defenses set up in the answers of the twelve other Atlantic seaboard states are entirely different from that asserted by the State of Florida, being based, in the case of each of those states, upon its claim to have received from England while it was a British colony (and, in the case of the State of New York, also from Holland while it was a Dutch colony) certain rights in the portion of the seabed in question which it did

not lose upon declaring its independence or upon becoming a part of the Federal Union.

As has been stated, on June 28, 1971 the Court severed the claim of the United States against the State of Florida from its claim against the twelve other defendant states in No. 35 Original, and on the same day authorized the initiation of supplemental proceedings in No. 9 Original to define with greater particularity than is stated in the decree of December 12, 1960, the seaward boundary of the submerged lands in the Gulf of Mexico in which the State of Florida has rights in the natural resources and beyond which the United States has those rights. On the same day, the Court consolidated the claim of the United States against the State of Florida which it had severed from Case No. 35 Original with the supplemental proceeding with respect to the State of Florida in No. 9 Original, the consolidated proceeding to be docketed as Case No. 52 Original, and appointed the undersigned as special master to conduct the proceeding, take testimony therein, and report thereon to the Court. 403 U.S. 949, 950.

A prehearing conference was held by me in Philadelphia on September 14, 1971 at which counsel submitted a joint prehearing statement which stipulated certain facts at issue in the proceeding. On September 22, 1971, I made a prehearing order adopting the joint prehearing statement of the parties, outlining the procedure to govern the further conduct of this proceeding and specifying the materials in the files in Nos. 9 and 35 Original which are to be part of the record in this proceeding. On November 8, 1973, I made an order amending paragraph 12 of the prehearing order. A copy of the prehearing order as amended, to which is attached the joint prehearing statement of the parties, is included in the appendix to this report.

The amended answer of the State of Florida in No. 35 Original had set up a counterclaim for damages and included a demand for a jury trial of the counterclaim.

The United States filed a motion to dismiss the counterclaim and deny the demand for a jury trial, which motion and the response of the State of Florida thereto were referred to me as special master for report and recommendation. I held a hearing thereon in Philadelphia on October 22, 1971. At the hearing the State asserted that its counterclaim was based solely upon the proposition that the provisions of the Submerged Lands Act operated as a taking by the United States without compensation of its rights to portions of the seabed beyond the three-mile limit in the Atlantic Ocean which were claimed by the United States. In reply the United States asserted that the Submerged Lands Act operated solely as a grant to the State; that if, contrary to the contention of the United States, the State of Florida did have preexisting seabed rights in the Atlantic Ocean beyond the three-mile limit the Submerged Lands Act did not diminish them and that it would continue to adhere to this view in this case. Accordingly, I filed a report recommending dismissal of the counterclaim and denial of the demand for a jury trial and my recommendation was adopted by the Court on December 20, 1971. 404 U.S. 998.

Formal hearings for the receipt of evidence were held in Tallahassee on March 6, 1972 and in Miami on September 26 and 27, 1972 and December 12 and 13, 1972. Thereafter briefs were submitted and oral argument by counsel took place in Philadelphia on September 19, 1973. From the evidence, both oral and documentary, and the stipulation of facts contained in the joint prehearing statement of the parties and after consideration of relevant matters of which judicial notice may be taken, I have made the findings of fact which appear as statements of fact throughout this report.

B. THE QUESTIONS INVOLVED

As already indicated, the ultimate question for decision in this proceeding is the determination of the seaward limits of the area of the seabed of the continental shelf in the Atlantic Ocean and the Gulf of Mexico in which the State of Florida has the proprietary right to the natural resources and seaward of which the United States has that right. In respect to those rights in the Gulf of Mexico, the Court has heretofore held in No. 9 Original "that the Submerged Lands Act grants Florida a three-marine-league belt of land under the Gulf, seaward from its coastline, as described in Florida's 1868 Constitution." 363 U.S. 121, 129. Accordingly, the supplemental proceeding in No. 9 Original relating to the Gulf of Mexico which is now part of the present consolidated proceeding is particularly directed to the more specific determination of the location of that coastline. However, it also involves the question whether the State of Florida is entitled to the full three-league belt of seabed seaward of that portion of its Gulf coastline, including the seaward limit of inland waters, south of Cape Romano in the region of the Florida Keys and Florida Bay. In determining these ultimate questions as to the extent of the rights of the State of Florida in the adjacent seabed of the Atlantic Ocean and the Gulf of Mexico, a number of subsidiary questions arise which must be dealt with and to these I now turn.

1. The effect of Congressional approval of Florida's 1868 Constitution as approval of the State boundaries described therein.

Pursuant to the authority of the Acts of Congress of March 2, 1867, 14 Stat. 428, and March 23, 1867, 15 Stat. 2, which provided the procedure by which secessionist states might be admitted to representation in Congress, the State of Florida adopted a new constitution

in 1868. By the Act of June 25, 1868, 15 Stat. 73, Congress approved the Florida Constitution of 1868 and admitted Florida to representation in Congress.

The Florida Constitution of 1868 in Article I described the boundaries of the State as follows:

> "The boundaries of the State of Florida shall be as follows: Commencing at the mouth of the river Perdido; from thence up the middle of said river to where it intersects the south boundary line of the State of Alabama, and the thirty-first degree of north latitude; then due east to the Chattahoochee river; then down the middle of said river to its confluence with the Flint river; from thence straight to the head of the St. Mary's river; then down the middle of said river to the Atlantic ocean; thence southeastwardly along the coast to the edge of the Gulf Stream; thence southwestwardly along the edge of the Gulf Stream and Florida Reefs to and including the Tortugas Islands; thence northeastwardly to a point three leagues from the mainland; thence northwestwardly three leagues from the land, to a point west of the mouth of the Perdido river; thence to the place of beginning."

In the opinion of the Court handed down on May 31, 1960 in No. 9 Original, it was held that by the Act of June 25, 1868 Congress approved the boundaries in the Gulf of Mexico thus claimed by the State in Article I of its 1868 Constitution, that being the only part of the State boundaries which was involved in that case, and that those boundaries were accordingly "boundaries . . . heretofore approved by the Congress" within the meaning of the Submerged Lands Act of 1953. 363 U. S. 121, 128. That Act will be discussed later in this report. Since Congress approved the 1868 Constitution as a whole, which document described the State boundaries in the Atlantic Ocean as well as in the Gulf of Mexico, it would appear

that the questions involved in the approval of each of these segments of the State boundary are necessarily identical in principle. The conclusion of the Court that the approval by Congress of the Constitution of 1868 involved approval of the boundary claimed by that Constitution in the Gulf of Mexico is thus equally applicable to the Atlantic boundary claimed in the same Constitution. It necessarily follows that Congress by the Act of June 25, 1868 approved the Atlantic boundary as well as that in the Gulf of Mexico.

2. The effect of Congressional approval of Florida's 1868 Constitution as a grant, express or implied, to the State of the proprietary right to the seabed and its natural resources within the boundaries described in the Constitution.

I consider first whether Congress expressly granted to the State of Florida the rights which it now claims to the submerged lands within its 1868 boundaries. The Act of June 25, 1868, 15 Stat. 73, upon which the State relies, contains no such express grant. By clear implication it approved the State Constitution of 1868, which approval Congress was required by the Acts of March 2, 1867, 14 Stat. 428, and March 23, 1867, 15 Stat. 2, to give before the State was readmitted to representation in Congress. And, as we have seen, the Court has held that this approval included the approval of the boundaries of the State which were set forth in that Constitution. But I find no language in either the Acts of 1867 or the Act of 1868 even remotely suggesting that Congress by the Act of 1868 intended to make a grant to the State of the seabed within those boundaries or that it did in fact do so.

I conclude that the claim of the State of Florida to an express grant from the United States must, therefore, be rejected.

The question remains whether a grant by the United

States of rights in the bed of the sea which lies within the boundaries of the State may be implied from the 1868 Congressional approval of those boundaries. Certainly the recognition of a maritime state boundary by the United States must have some effect with respect to the power of the state in the maritime belt of sea within that boundary. See *United States v. California*, 1947, 332 U.S. 19, 36. Otherwise the boundary would be quite meaningless, a mere line upon the map. And so it is clear to me that the State of Florida does have certain governmental power within that maritime area, particularly in matters of special concern to the State and in which the United States has not preempted the field. See, e.g., *Skiriotes v. Florida*, 1941, 313 U.S. 69, and *Askew v. American Waterways Operators, Inc.*, 1973, 411 U.S. 325. But this power is subordinate to the paramount power and rights of the United States, its *imperium* and *dominium*, in and over the marginal belt of territorial sea along the coasts of the State, the protection and control of which area has always been a function of national external sovereignty.

In the opinion of the Court in *United States v. California*, 1947, 332 U.S. 19, 38-39, it was expressly held that the United States, rather than the State of California, has paramount rights in and power over the marginal belt of territorial sea, an incident of which is full dominion over the resources of the seabed within that water area. It appeared in that case that the State of California had been admitted to the Union by an Act of Congress of September 9, 1850, 9 Stat. 452, with a constitutionally fixed boundary extending three miles from low-water mark into the Pacific Ocean, which boundary the Act of 1850 ratified. Nonetheless, refusing to extend the inland waters rule of *Pollard's Lessee v. Hagan*, 1845, 3 How. (U.S.) 212, the Court held, as I have indicated, that the State of California was not the owner of the three-mile marginal belt along its coast. This principle was reaffirmed by the Court in *United States v. Louisiana*, 1950, 339 U.S. 699, and *United States*

v. Texas, 1950, 339 U.S. 707, and applied in denying the seabed claims of those states. Indeed, in the Texas case the Court went on to hold [pp. 717-718] that the State of Texas had relinquished to the United States its claim to the marginal sea when it was admitted to the Union even though as an independent republic before admission it had a maritime boundary in the Gulf of Mexico within which it had all the jurisdiction, powers and proprietary rights of a sovereign state. Later, the Court expressly pointed out that the doctrine of *United States v. California*, 1947, 332 U.S. 19, is applicable to all coastal states. *United States v. Louisiana*, 1960, 363 U.S. 1, 7.

The State of Florida contends that the United States accepted the cession of Florida from Spain as a trustee for the states later to be created from that territory, that the cession included rights of ownership in the maritime belt of territorial sea along its coasts and that when the State of Florida was admitted to the Union it received those rights as trustee for its people. *Pollard's Lessee v. Hagan*, 1845, 3 How. (U.S.) 212 and *Shively v. Bowlby*, 1894, 152 U.S. 1, are relied upon to support this position. It is a sufficient answer to this contention, however, to recall that the doctrine of these cases was restricted by the Court in *United States v. California*, 1947, 332 U.S. 19, 36, to the inland waters of a state shoreward of the low-water mark along its coast and that the doctrine is not applicable, as the State of Florida contends, to the seabed of the ocean seaward from the low-water mark.

The State of Florida further suggests that the doctrine enunciated in *United States v. California*, 1947, 332 U.S. 19, and followed in *United States v. Louisiana*, 1950, 339 U.S. 699, and *United States v. Texas*, 1950, 339 U.S. 707, has been overruled in effect by the enactment of the Submerged Lands Act of 1953. That Act will be discussed later in this report. It is sufficient here merely to point out that in *United States v. Louisiana*, 1960, 363 U.S. 1, 6-7, the Court said of the Submerged Lands Act:

". . . By that Act the United States relinquished to the coastal States all of its rights in such lands within certain geographical limits, and confirmed its own rights therein beyond those limits. The Act was sustained in *Alabama v. Texas*, 347 U.S. 272, as a constitutional exercise of Congress' power to dispose of federal property. Const. Art. IV, §3, cl. 2. Since the Act concededly did not impair the validity of the *California, Louisiana,* and *Texas* cases, which are admittedly applicable to all coastal States, this case draws in question only the geographic extent to which the statute ceded to the States the federal rights established by those decisions."

I conclude that the State of Florida did not receive from Congress in 1868 an implied grant of the proprietary rights to the bed of the marginal sea within the boundaries fixed by its 1868 Constitution.

3. The effect of the Submerged Lands Act of 1953.

In the cases of *United States v. California*, 1947, 332 U.S. 19, *United States v. Louisiana*, 1950, 339 U.S. 699, and *United States v. Texas*, 1950, 339 U.S. 707, the Court had held, as we have seen, that the claims of those states to the ownership of the seabed of the marginal sea beyond the low-water mark of the coastline and the seaward limit of inland waters were invalid because the United States had rights paramount to the states in that area. In order to grant to the states, at least in part, the rights in the seabed of the marginal sea for which they had contended, Congress shortly thereafter enacted the Submerged Lands Act of May 22, 1953, 67 Stat. 29, 43 U.S.C.A. §§1301-1315, the text of which is set out in the appendix. The scope and effect of that Act have been fully considered and determined by the Court and it is quite unnecessary for me to analyze the Act in detail here. In *United States v. Cali-*

fornia, 1965, 381 U.S. 139, the Court described the effect of the Act as follows [pp. 145-148]:

> "The Submerged Lands Act grants to the States 'title to and ownership of the lands beneath navigable waters within the boundaries of the respective States.' §3(a). 'Boundaries' includes the seaward boundaries of a State 'as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress,' but subject to the limitation that
>
> > 'in no event shall the term "boundaries" . . . be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico.' §2(b).
>
> " 'Coast line' is then defined as the composite 'line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters.' §2(c). For States having no previously approved seaward boundaries the Act provides that '[a]ny State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line. . . .' §4."

In its earlier opinion in No. 9 Original with respect to the claims of the State of Florida, the Court summarized the effect of the Act as follows [363 U.S. 121-122]:

> "The Act granted to all coastal States the lands and resources under navigable waters extending three geographical miles seaward from their coastlines. In addition to the three miles, the five Gulf States were granted the submerged lands as far out as each State's boundary line either 'as it existed at the time such

> State became a member of the Union,' or as previously 'approved by Congress,' even though that boundary extended further than three geographical miles seaward. But in no event was any State to have 'more than three marine leagues into the Gulf of Mexico.' "

It thus appears that the Act grants title to and ownership of the lands and their natural resources beneath the navigable waters within the seaward boundaries of each maritime state, but specifies that for the purposes of the Act "boundaries" are only those existing at the time of admission to the Union or as theretofore approved by Congress and are to be interpreted as in no event extending more than three miles from the coastline into the Atlantic or Pacific Oceans or more than three leagues into the Gulf of Mexico. Moreover in order that a state admitted subsequently to the formation of the Union may have the full benefit of the Act, section 4 provides that any such state which has not already done so may extend its seaward boundaries to a line three miles distant from its coastline, without prejudice to the existence of any state's seaward boundary beyond three miles "if it has been heretofore approved by Congress." The latter provision was added to assure that the three-league Gulf "boundary claims of Texas and Florida would be preserved." *United States v. Louisiana*, 1960, 363 U.S. 1, 29. In *United States v. Florida*, 1960, 363 U.S. 121, 128, the Court held, as we have seen, that the boundary of the State of Florida on the Gulf coast was approved by Congress in 1868 as extending more than three miles seaward from the coastline, namely, three leagues. Its 1868 boundary along the Atlantic coast, however, was in certain areas less than three miles from the coastline as I shall later point out. Accordingly, taking advantage of the authority conferred on the State by section 4 of the Submerged Lands Act to extend its boundary on the Atlantic coast to the outer line of the three-mile belt of marginal sea, the State of Florida enacted the Act of

May 31, 1955, Laws of Florida, 1955, chap. 29744, which provided in whole as follows:

"AN ACT fixing and establishing the boundary of the State of Florida along the Atlantic Ocean and the Florida Straits, as authorized by Public Law 31, also described as Chapter 65, of the first session of the Eighty-third Congress of the United States.

"*Be It Enacted by the Legislature of the State of Florida:*

"WHEREAS, it is provided by section 4, chapter 65, or Public Law 31, of the First Session of the Eighty-third Congress of the United States, approved May 22, 1953 (title 43, sections 1301-1315, United States Code) that 'any state admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line . . .,' which coast line is defined by said act of congress as meaning 'the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters.' and,

"WHEREAS, the Atlantic boundary of the State, as set out in present article 'I' of the state constitution, is indefinite and not clearly defined, and should be redefined and extended in accordance with the authority granted by said section 4, of chapter 65, or public law 31, of the first session of the eighty-third Congress of the United States. *NOW, THEREFORE,*

"*Be It Enacted by the Legislature of the State of Florida:*

"Section 1.

"Wherever the coast line of the State of Florida,

both along the East coast of the mainland and along the Florida Keys, is in direct contact with the waters of the Atlantic Ocean or the Florida Straits, which latter is an arm of the Atlantic Ocean, the seaward boundary of the State of Florida is hereby fixed, defined, and interpreted as, and is hereby extended to, a line three geographical miles distant from said coast line. The term 'coast line' means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters.

"Section 2. All laws and parts of laws in conflict herewith are hereby repealed.

"Section 3. This act shall take effect immediately upon its becoming a law.

"Approved by the Governor May 31, 1955."

The boundary provisions of Article I of the 1868 Constitution of the State of Florida had been carried without change into Article I of the revised Constitution of 1885. On November 6, 1962, the State adopted an amendment to Article I of the 1885 Constitution. This amendment defined the boundary of the State in the Atlantic Ocean in conformity with the Act of 1955. It also more precisely defined the boundary in the Gulf of Mexico. The text of the amendment is as follows:

"The state boundaries are: Begin at the mouth of the Perdido River, which for the purposes of this description is defined as the point where latitude 30° 16′ 53″ north and longitude 87° 31′ 06″ west intersect; thence to the point where latitude 30° 17′ 02″ north and longitude 87° 31′ 06″ west intersect; thence to the point where latitude 30° 18′ 00″ north and longitude 87° 27′ 08″ west intersect; thence to the point where the center line of the Intracoastal Canal (as the same existed on June 12, 1953) and longitude

87° 27′ 00″ west intersect; the same being in the middle of the Perdido River; thence up the middle of the Perdido River to the point where it intersects the south boundary of the State of Alabama, being also the point of intersection of the middle of the Perdido River with latitude 31° 00′ 00″ north; thence east, along the south boundary line of the State of Alabama, the same being latitude 31° 00′ 00″, north to the middle of the Chattahoochee River; thence down the middle of said river to its confluence with the Flint River; thence in a straight line to the head of the St. Mary's River; thence down the middle of said river to the Atlantic Ocean, and extending therein to a point three (3) geographic miles from the Florida coast line, meaning the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters; thence southeastwardly following a line three (3) geographic miles distant from the Atlantic coast line of the state and three (3) leagues distant from the Gulf of Mexico coast line of the state to and around the Tortugas Islands; thence northeastwardly, three (3) leagues distant from the coast line, to a point three (3) leagues distant from the coast line of the mainland; thence north and northwestwardly, three (3) leagues distant from the coast line, to a point west of the mouth of the Perdido River, three (3) leagues from the coast line, as measured on a line bearing 0° 01′ 00″ west from the point of beginning; thence along said line to the point of beginning."

It seems clear from both the language and effect of this Constitutional amendment that its purpose, at least in part, was to place in constitutional form the change made by the Act of 1955 in extending the boundary of the State seaward into the Atlantic Ocean at all points to the

full three geographical miles distant from its coastline which the Submerged Lands Act had authorized. And since section 4 of that Act expressly approves and confirms any such action taken either before or after 1953, it is also clear that the boundary defined by the Act of 1955 and the 1962 Constitutional amendment was a boundary "extended or confirmed" pursuant to that section within the meaning of section 2(b) of the Act. It necessarily follows that the State of Florida is entitled under the Submerged Lands Act, as against the United States, to title to and ownership of the lands beneath the navigable waters and the natural resources within such lands and waters seaward for a distance of three geographical miles, but no farther, along its entire Atlantic coastline as defined in that Act.

There are some places along the Atlantic coast of the State of Florida where the 1868 boundary lies at a greater distance than three miles from the coast. Here the effect of the 1955 Act and the 1962 Constitutional amendment was to abandon the jurisdiction of the State and to relinquish to the United States its incidental claim (which I have held to be invalid) to the seabed in the areas beyond the new three-mile Atlantic boundary which the Act and the Constitutional amendment fixed. For at that time the United States, pursuant to President Truman's proclamation of September 28, 1945, 59 Stat. 884, was claiming the right to the resources of the seabed of the continental shelf, an area in which the rights of the United States are in any event paramount to those of the State. *United States v. California*, 1947, 332 U.S. 19, 38-39. And the rights of the United States as against the coastal states to the seabed of the continental shelf, beyond the coastal belt which had been granted to the States by the Submerged Lands Act, had been confirmed by the enactment of the Outer Continental Shelf Lands Act of August 7, 1953, 67 Stat. 462. The authority of Congress to deal with the seabed of the continental shelf and its resources is fully recognized by the rules of international law which have now been codified

in the Convention on the Continental Shelf, 15 U.S.T. (Pt. 1) 471, which entered into force on June 10, 1964.

I accordingly find that the State of Florida is entitled, as against the United States, to the land beneath navigable waters and the natural resources within such lands and waters within its boundaries approved by Congress extending three geographical miles from its coastline on the Atlantic coast and not more than three marine leagues from its coastline on its Gulf of Mexico coast. It follows, of course, that beyond those limits the United States has the right, as against the State of Florida, to explore and exploit the seabed of the continental shelf and its resources.

4. The dividing line between the Atlantic Ocean and the Gulf of Mexico.

In view of the fact that the Submerged Lands Act grants Florida a belt of up to three leagues of submerged lands along its Gulf of Mexico coast but only a three-mile belt along its Atlantic coast, it becomes necessary to determine where on the Florida coast the Gulf of Mexico ends and the Atlantic Ocean begins. Since the Act contains no description of the extent or limits of the Gulf of Mexico the area comprising the Gulf must be determined in the light of general understanding and usage in 1953 when the Act was passed. The evidence of expert witnesses and a large amount of documentary evidence were received by me on this question.

Stated differently, the question is whether the Straits of Florida which lie between the islands of Cuba and the Bahamas on the south and east and the Florida Keys on the north and west are an arm of the Atlantic Ocean or of the Gulf of Mexico. The question seems to turn on whether we accept the views of geographers, cartographers, historians and explorers who are primarily concerned with the surface of the sea, as the United States urges, or those of marine geologists who are primarily concerned with the topography of the sea floor, as Florida urges.

The United States points to a line which has been formulated by the International Hydrographic Bureau for the convenience of national hydrographic offices when compiling their sailing directions, notices to mariners, etc., so as to insure that all such publications headed with the name of an ocean or sea will deal with the same area. Admittedly, this line has no political significance, but the United States urges that it does represent the general view held by geographers, cartographers and historians. The line referred to is stated in the publication of the International Hydrographic Bureau, entitled "Limits of Oceans and Seas", Special Publication No. 23, 3d ed., issued in 1949, [U.S. Exhibit No. 63] to run through the island of Cuba "to the meridian of 83° W. and to the Northward along this meridian to the latitude of the South point of the Dry Tortugas (24° 35′ N.), along this parallel Eastward to Rebecca Shoal (82° 35′ W.), thence through the shoals and Florida Keys to the mainland at eastern end of Florida Bay, all the narrow waters between the Dry Tortugas and the mainland being considered to be within the Gulf." The same description has been repeated in the later printings of the publication in 1950 [U.S. Exhibit No. 64] and 1953 [U.S. Exhibit No. 58], and substantially the same line, although terminating at Key West rather than the eastern end of Florida Bay, was used in the 1st edition of the publication in 1923 [U.S. Exhibit No. 60] and its 2d edition in 1928 [U.S. Exhibit No. 61]. The testimony of Dr. Louis DeVorsey, a professional geographer, supports this line, as does a large amount of documentary evidence.

The State of Florida contends, on the other hand, that it is the configuration of the sea bottom which determines the question and points out that if they were all parts of a dry upland basin the Straits of Florida would drain into the basin of the Gulf rather than into the Atlantic Ocean. The State argues that, by this criterion, the Straits of Florida southwest of latitude 25° 40′ north must be held to be a part of the Gulf of Mexico and not of the Atlantic

Ocean. The position of the State is supported by the testimony of Dr. Robert N. Ginsburg, a marine geologist and sedimentologist, and some documentary evidence.

I cannot accept this view. In my opinion the position taken by the United States is correct that it is the concept of the Gulf of Mexico as understood by geographers, mariners, explorers and historians with which Congress was concerned when it referred to the Gulf in the Submerged Lands Act. I find the great weight of the evidence to support the concept that the Straits of Florida are an arm of the Atlantic Ocean and not of the Gulf of Mexico. Moreover, I am fortified in this conclusion by the confirmatory evidence of the State of Florida when, in the Act of May 31, 1955, which was drafted in the light of the Submerged Lands Act and which I have already quoted, the State, in defining the extended Atlantic coast boundary which it was establishing, declared that the Florida Straits "is an arm of the Atlantic Ocean". While the Act of 1955 was repealed in 1971 (Chapter 71-348), it stands as an expression of the understanding of the State at about the time of the enactment of the Submerged Lands Act.

I am satisfied that the dividing line fixed by the International Hydrographic Bureau in its publication "Limits of Oceans and Seas" is the correct one. As we have seen, that line extends from the island of Cuba north on the meridian of 83° west longitude to the south point of the Dry Tortugas and from this point along the parallel of 24° 35′ north latitude eastward to Rebecca Shoal and "thence through the shoals and Florida Keys to the mainland at eastern end of Florida Bay". The line of the parallel of 24° 35′ north latitude extended eastward from Rebecca Shoal passes over the Quicksands Shoal and intersects the Marquesas Keys. Eastward of the Marquesas Keys the succession of islands in the Florida Keys bears southeastwardly to Woman Key and thence northeastwardly to Key Largo. I find, therefore, that the dividing line between the waters of the Atlantic Ocean and the Gulf of Mexico coincides

with the parallel of 24° 35′ north latitude from the south point of the Dry Tortugas to the Marquesas Keys.

I accordingly find that the line dividing the Gulf of Mexico from the Atlantic Ocean north of Cuba begins on the northern coast of Cuba at the meridian of 83° west longitude, and extends thence to the northward along that meridian to the south point of the Dry Tortugas in 24° 35′ north latitude; thence eastward along that parallel to Rebecca Shoal, the Quicksands Shoal and the Marquesas Keys; and thence through the Florida Keys to the mainland at the eastern end of Florida Bay, all the narrow waters between the Dry Tortugas, the Keys and the mainland being considered to be within the Gulf.

5. The location of the 1868 State boundaries.

I turn next to consider the precise location of the 1868 boundary of the State, as it existed prior to the enactment of the Florida Act of May 31, 1955 and the adoption of the Constitutional Amendment of 1962. The land portion of the boundary from the mouth of the Perdido river to the mouth of the St. Mary's river is, of course, not involved in this proceeding. The remainder of the boundary will be considered in consecutive segments.

(a) *"then down the middle of said river [the St. Mary's] to the Atlantic ocean; thence southeastwardly along the coast to the edge of the Gulf Stream;"*

The general trend of the Florida coastline on the Atlantic Ocean is, and in 1868 was, "southeastwardly" between the mouth of the St. Mary's river and a point one geographical mile north of Lake Worth inlet. The State argues that "along the coast" as here used means "parallel to the coast" and its expert witness testified that the boundary line should be drawn down the middle of the St. Mary's river to its mouth and out to the last ocean buoy between two and one-half and three miles from the river

mouth in 10 fathoms of water and thence southeastwardly following the 10-fathom contour line off the coast to the point where the coast takes a southwestwardly turn. I see no basis in the constitutional phrase "along the coast" for such a conclusion, however, and am compelled to accept the contention of the United States that this segment of the boundary, described as "along the coast", is coincident with the coastline and follows the low-water line along the coast and the line marking the seaward limit of inland waters.

It will be observed that this segment of the State boundary is to run southeastwardly along the coast "to the edge of the Gulf Stream". It must, therefore, be determined where the boundary reaches the Gulf Stream, the western edge of which I find lies along the 100-fathom contour line. This is the line which early cartographers seem to have agreed, and which the parties now agree, represents the edge of the Gulf Stream. Since the boundary runs "southeastwardly" to the Gulf Stream, it appears, and the parties agree, that it must leave the coastline and proceed to the Gulf Stream at the point where the coastline ceases to run in a southeasterly direction but turns to the southward and southwestward. I find that this point on the coast is almost exactly one geographical mile north of Lake Worth inlet. The parties suggest that at this point the boundary turns due east to the 100-fathom line at the edge of the Gulf Stream. I see no basis, however, for such a deviation from the "southeastwardly" call. It appears that the coastline for a distance of at least four miles north of the point of departure mentioned above follows a very nearly straight course in a general southeastwardly direction. I conclude that a proper application of the constitutional language requires that the general heading of this final section of the boundary along the low-water mark of the coastline should be followed by the boundary in the same southeastwardly direction until it reaches the 100-fathom line at the western edge of the Gulf Stream.

(b) *"thence southwestwardly along the edge of the Gulf Stream and Florida Reefs to and including the Tortugas Islands;"*

It seems clear, and the parties agree, that this segment of the 1868 boundary follows the 100-fathom line along the western edge of the Gulf Stream, which in this area is almost parallel to and approximately three miles from the Florida coast, until the northern end of the Florida Reefs is reached, and that it then follows the five-fathom contour line, which the parties agree and I find to be generally recognized as representing the edge of a reef, along the southwestern and southern edge of the Florida Reefs to their western end and thence in a straight line a distance of about 27 miles to the five-fathom line on the south side of the Dry Tortugas Islands. The question remains, however, as to the point where the boundary leaves the Gulf Stream and follows the Florida Reefs. It appears that Fowey Rocks should be held to be that point. It is south of that point that the Gulf Stream diverges more and more from the Florida coast. Moreover, from early times, Fowey Rocks have been regarded as the true beginning of the reef, the first dry spot on it. South of Fowey Rocks the reef becomes the dominant geographic feature of the coastline; north of Fowey Rocks, commencing with Key Biscayne, sandy islands are the dominant feature. Accordingly, the parties agree, and I find, that this segment of the boundary follows the 100-fathom line along the western edge of the Gulf Stream southwardly to a point due east of Fowey Rocks and thence runs due west to the five-fathom line seaward of Fowey Rocks, thence southwestwardly along the five-fathom line seaward of the Florida Reefs to the western end of the Reefs and thence in a straight line to the five-fathom line south of the Dry Tortugas Islands.

I accordingly find that the section of the 1868 boundary of the State of Florida between the mouth of the

St. Mary's river and the Dry Tortugas Islands may be more precisely defined and located as follows:

> Beginning at the point where the middle of the St. Mary's river meets the seaward limit of the river mouth; thence in a general southeasterly direction along the ordinary low-water line along the coast and the line marking the seaward limit of inland waters to a point one geographical mile north of Lake Worth inlet; thence on the same heading as the coastline immediately to the north of that point in a general southeastwardly direction to the 100-fathom line on the western edge of the Gulf Stream; thence in a general southwardly direction along the 100-fathom line to a point due east of Fowey Rocks; thence due west to the five-fathom line seaward of Fowey Rocks; thence along the five-fathom line seaward of the Florida Reefs in a general southwestwardly direction to the western end of the Reefs; and thence northwestwardly in a straight line to the five-fathom line south of the Dry Tortugas Islands, and along the five-fathom line to the point where it intersects latitude 24° 35′ north.

(c) *"thence northeastwardly to a point three leagues from the mainland;"*

With respect to the segment of the boundary which runs from the Dry Tortugas Islands to the mainland the contentions of the parties are far apart. The State contends that the term "northeastwardly" as used to describe this segment of the boundary must be taken to mean due northeast, i.e., on a course 045° from north, and that by taking that course the boundary runs from a point three leagues northwest from the Dry Tortugas Islands in a straight line to a point three leagues from the mainland in the vicinity of Cape Romano. The United States, on the other hand, insists that the term "northeastwardly" indicates merely the general overall direction of the boundary in this area and that the boundary actually begins at the

northeasterly extremity of the shallow water surrounding the Dry Tortugas Islands, and from thence follows a straight line to the five-fathom line curving north of the "New Ground" shallows which lie northwest of the Marquesas Keys; from thence follows the five-fathom curve around the northern edge of these shallows to their eastern extremity; from thence follows a straight line to the three-fathom line north of the Marquesas Keys; and from thence follows the three-fathom line north of the Marquesas Keys and north and east of the Florida Keys and the shallow waters of Florida Bay to a point where the three-fathom line intersects an arc of a circle with a diameter of three leagues centered on the Northwest Cape of Cape Sable.

I am unable to accept either of these contentions. The term "northeastwardly" does not indicate a specific direction as may the more precise term "northeast". On the contrary, "northeastwardly" merely indicates a general direction which may be anywhere between north and east, depending upon other factors such as any relevant meets and bounding features which may be specified or implied. Here only one meet is specified, the Dry Tortugas Islands. The other end of this segment of the boundary, a "point three leagues from the mainland", is indefinite since it may be located at any place on the outer line of the three-league belt of marginal sea lying along the coast of the mainland. We must, therefore, look elsewhere for light on the intended location of this portion of the boundary.

The State of Florida points to the physical fact that the western portion of the boundary contended for by the United States actually runs southeastwardly rather than northeastwardly and does not take a northeasterly course until it reaches the vicinity of Boca Grande Key. This is quite true, but I do not believe that the term "northeastwardly", as here used, is to be given so restricted a meaning. On the contrary, as I have already suggested, I think it is intended to indicate merely the general direction of this section of the boundary taken as a whole.

In this broad sense the line contended for by the United States does run northeastwardly. Both Cape Sable and Cape Romano, the termini contended for by the United States and the State, respectively, are in fact situated north and east of the point of beginning, the Dry Tortugas. A consideration of other language in the 1868 Constitutional boundary description fortifies this view. Thus the line along the Florida Reefs and to the Dry Tortugas is defined by the 1868 Constitution as running "southwestwardly" whereas the western end of the line actually runs northwestwardly. But the fact remains that the Dry Tortugas are in fact located south and west of Fowey Rocks so that the line connecting them may fairly be said in a general sense to run southwestwardly. Likewise the line defining the boundary along the Gulf coast of the mainland north of the area here under discussion is defined as running "northwestwardly three leagues from the land, to a point west of the mouth of the Perdido river". A long section of this line runs northeastwardly and another section southwestwardly but the mouth of the Perdido river is unquestionably north and west of Cape Sable and Cape Romano and the line as a whole may, therefore, fairly be described as running "northwestwardly". I am satisfied, therefore, that the use of the term "northeastwardly" does not eliminate the possibility of a boundary which in certain places deviates from that general direction so long as one terminal point is definitely north and east of the other.

A determination that this segment of the State boundary runs to the northeast on a heading of 045° from north would result in the inclusion within the State of a very large roughly semicircular area of comparatively deep water of the continental shelf in the Gulf of Mexico. The greater part of this area has never been claimed as part of its territorial sea by the United States which regards it as international waters. Moreover, the great weight of the evidence before me, consisting of ancient documents

received as exhibits and the testimony of expert witnesses, establishes, and I find, that in 1868 and prior thereto the interests of the State of Florida and its residents in this area were almost entirely limited to the taking of sponges, turtles and fish in the comparatively shallow waters, less than three fathoms deep, adjacent to the Keys and in the channels between them. It appears that in those days activities, other than shipping, in the area of deeper water to the north and west of the Keys were very minimal and the economic interests of southern Florida did not extend seaward into that area to any substantial extent. There is no evidence to indicate, and I do not believe, that the framers of the 1868 Constitution gave actual attention to this large area of the Gulf of Mexico or intended to include it within the State boundaries.

But, on the other hand, I find no basis whatever in the record to support the contention of the United States that the "northeastwardly" boundary was intended by the framers of the 1868 Constitution to run from the five-fathom line north of the Dry Tortugas to the five-fathom line north of the "New Ground" shallows and thence to the three-fathom line north of the Marquesas and to follow that line north of the Keys to its intersection with a three-league arc centered at Northwest Cape on Cape Sable. Moreover, that construction of the constitutional language is in my opinion precluded by the presence of certain other indicia as to the location of this portion of the boundary and to the consideration of these I now turn.

It is evident from the language of the constitutional boundary description that its framers were familiar with and adopted the idea of claiming a boundary three leagues offshore in the Gulf of Mexico. For in the description of the final segment of the boundary along the Gulf coast of the mainland of the State this precise three-league boundary is described and claimed. Moreover, in the description of the very segment of the boundary which we are now considering the three-league boundary is mentioned

as the terminal point. Accordingly, in the absence of anything to the contrary in the phrase "thence northeastwardly to a point three leagues from the mainland", I think it is permissible to infer that the northeastwardly line was itself intended to run three leagues from the Dry Tortugas and the coast of the Keys and the seaward limit of inland waters to a point three leagues from the mainland. And in my opinion this conclusion is compelled by the 1962 amendment to the Constitution of the State. That amendment has already been discussed in connection with its effect on the boundary of the State along the Atlantic coast. I note at this point that the 1962 amendment dealt with the boundary on the Gulf also. With respect to the Gulf coast, however, the amendment made no seaward extension of the boundary as it did with the boundary along the Atlantic coast. The Gulf coast boundary was still limited to a line three leagues distant from the coast. But the amendment defined the line in somewhat more precise terms. Thus by the 1962 amendment the former description of the segment of the boundary which we are now considering, namely, "thence northeastwardly to a point three leagues from the mainland", was amended to read "thence northeastwardly, three (3) leagues distant from the coast line, to a point three (3) leagues distant from the coast line of the mainland". In my opinion the boundary described in this amendment is not inconsistent with the boundary described in the 1868 Constitution but rather is intended to give definiteness and precision to the more general and indefinite language used in that Constitution.

But even if we should assume, for the purpose of discussion, that there is merit in this contention of the State of Florida the end result would still be the same. For if its 1868 boundary in this area should be assumed to be a straight line drawn from the Dry Tortugas to the vicinity of Cape Romano, the effect of the 1962 Constitutional amendment would be to withdraw the boundary

claim of the State to the three-league line north and west of the coastline of the Florida Keys which that amendment calls for. The effect of this would clearly be to give up the jurisdiction of the State over the area from which it had thus withdrawn and in the seabed of which the United States has claimed a proprietary interest since the year 1945. It is true that by a constitutional revision in 1968 the State redefined this segment of its boundary as "thence northeast along a straight line to a point three leagues from the coastline of Florida". However, the State could not in this way validly recapture, without the consent of the United States, territory and jurisdiction relinquished in 1962 to the federal government, if that was in fact the effect of the 1962 amendment. Nor could it thus, without the consent of the United States, extend its boundaries into the Gulf of Mexico, if the northeastwardly boundary claimed in the 1868 Constitution was in fact, as I have found, the northeastwardly boundary more precisely defined in the 1962 Constitutional amendment.' *United States v. Texas*, 1950, 339 U.S. 707, 720.

The conclusion to which I have come with respect to the segment of the State boundary in the Gulf of Mexico north of the Dry Tortugas and the Florida Keys is consistent with the previous opinion and decree of the Court in No. 9 Original. The Court was there called upon to determine the extent of the grant of submerged lands and resources in the Gulf of Mexico which was effected by the Submerged Lands Act of 1953. That Act, which is discussed earlier in this report, purported to vest in the Gulf States the submerged lands and resources out to their respective boundaries as they existed upon admission to the Union or as they had been approved by Congress, but in no event to a distance of more than three leagues into the Gulf of Mexico. The Court was thus required to ascertain the location of the Congressionally approved boundary of the State of Florida in order to determine the extent of the grant to the State made by the Act. In its opinion

the Court stated that "Congress in 1868 did approve Florida's claim to a boundary three leagues from its shores", and held that "the Submerged Lands Act grants Florida a three-marine-league belt of land under the Gulf, seaward from its coastline, as described in Florida's 1868 Constitution." 363 U.S. 121, 128-129. Likewise in the decree entered pursuant to that opinion it was adjudged that as "against the United States, the defendant States are respectively entitled to all the lands, minerals and other natural resources underlying the Gulf of Mexico, extending seaward from their coast lines for a distance of three leagues in the case of . . . Florida. . . ." 364 U.S. 502. No exception is noted in either opinion or decree for that portion of the coastline of the State in the Gulf of Mexico lying along the northern shores of the Dry Tortugas and the Florida Keys. While it may be that this particular portion of the 1868 boundary was not in focus in the formulation of that decision, the decision would nonetheless seem clearly and expressly to adjudicate it. In any event my conclusion with respect to the boundary conforms to it. It must, of course, be remembered that the approval of a three-league boundary in the Gulf of Mexico was for purely domestic purposes, such as the delimitation of the rights of the State under the Submerged Lands Act, and was not necessarily effective as against foreign nations in view of the fact that the United States has never claimed a belt of territorial sea exceeding three miles in width. See *United States v. Louisiana*, 1960, 363 U.S. 1, 30-36, 64.

Since there is an expanse of at least 35 miles of open water between the Dry Tortugas Islands and the westernmost of the Marquesas Keys and since, admittedly, the 1868 boundary of the State encompasses both, the boundary must, of necessity, be projected in a straight line from the three-league line north of the Dry Tortugas to the three-league line north of the Marquesas and the other lower Florida Keys. Moreover, since, as appears later in this report, I have found that the waters of Florida Bay, properly

limited and defined, are inland waters of the State, the 1868 State boundary must be three leagues seaward of the line marking the seaward limit of those inland waters.

I accordingly find that the section of the 1868 boundary of the State of Florida between the Dry Tortugas Islands and the mainland may be more precisely defined and located as follows:

> Beginning at a point on the five-fathom contour line south of Loggerhead Key, the westernmost of the Dry Tortugas Islands, where that line intersects the parallel of 24° 35′ north latitude; thence due west in latitude 24° 35′ north to a point in longitude 83° west; thence due south in longitude 83° west to a point three marine leagues southwestwardly from Loggerhead Key or any low-tide elevation which is southwestwardly from Loggerhead Key and within three geographical miles thereof; thence in a general northwardly and northeastwardly direction three marine leagues from the coastline of the Dry Tortugas Islands and low-tide elevations to a point north of East Key; thence southeastwardly in a straight line to a point three marine leagues from the ordinary low-water line of the north coast of the Marquesas Keys; thence northeastwardly three marine leagues from the ordinary low-water line of the coast of the Marquesas Keys and three marine leagues from the ordinary low-water line of the coast of the Florida Keys and three marine leagues from the line marking the seaward limit of the inland waters of Florida Bay to a point three marine leagues from the ordinary low-water line of the mainland.

(d) *"thence northwestwardly three leagues from the land, to a point west of the mouth of the Perdido river; thence to the place of beginning."*

There is no dispute between the parties as to the

location of this final segment of the boundary along the western coast of the mainland of the State from Florida Bay to the Perdido river. It has been definitely adjudicated by the Court to be a line at the distance of three leagues seaward from the coastline. 363 U.S. 121, 128; 364 U.S. 502. Its location in the vicinity of the mouth of the Perdido river is precisely defined in the 1962 Constitutional amendment.

I accordingly find that the segment of the 1868 boundary of the State of Florida between Florida Bay and the Perdido river is located as follows:

> Beginning at the point where a line three marine leagues from the seaward limit of Florida Bay intersects a line three marine leagues from the coast of the mainland of the State; thence in a general northwestwardly direction three marine leagues from the ordinary low-water line along the coast and the line marking the seaward limit of inland waters to a point west of the mouth of the Perdido river and three marine leagues distant therefrom, as measured on a line bearing 0° 01′ 00″ west therefrom; and thence along the said line to the mouth of the Perdido river in latitude 30° 16′ 53″ north and longitude 87° 31′ 06″ west, the place of beginning.

6. The location of the present State boundaries for the purposes of the Submerged Lands Act.

The findings which I have made with respect to the precise location of the boundary line of the State of Florida as described in its 1868 Constitution have been made at the request of the parties. As I have already pointed out, however, the Submerged Lands Act of 1953 expressly authorized the State to extend its existing boundary in the Atlantic Ocean a full three geographical miles seaward from its Atlantic coastline. The Florida Act of May 31, 1955 and its 1962 Constitutional amendment took

advantage of this statutory authority to extend out to the three-mile limit those portions of its Atlantic coastal boundary which lie along the coast or within three miles of it. Being thus expressly authorized by the Submerged Lands Act, this revised Atlantic coastal boundary is the boundary on that coast approved by Congress within the meaning and for the purposes of the Act, and is, therefore, in my opinion the only Atlantic coastal boundary which is of any significance in this proceeding. A further seaward extension of the northern section of the Atlantic coastal boundary purporting to have been made by the Florida revised Constitution of 1968 does not meet the definition of the Submerged Lands Act and has not been approved by Congress. It is, therefore, of no significance in determining the issues involved in this proceeding.

Under both the 1868 Constitution and the 1962 Constitutional amendment the State boundary is described as extending to and around the Dry Tortugas Islands. By this description the boundary is made to include a large area of open water between the Marquesas Keys and the Dry Tortugas which is more than three geographical miles or even three marine leagues from the coastline of either of those groups of islands. The Submerged Lands Act provides, as we have seen, that for the purposes of that Act a state boundary may not "be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean . . . , or more than three marine leagues into the Gulf of Mexico". Accordingly, the area of open water in the Atlantic Ocean more than three miles from the coastlines of the Marquesas Keys and the Dry Tortugas Islands and in the Gulf of Mexico more than three leagues therefrom cannot be included within the boundaries of the State of Florida for the purposes of defining the grant of the seabed and its resources made by the Submerged Lands Act. Whether this area of open water between the Marquesas and the Dry Tortugas may be considered to be within the boundaries of the State for

other purposes is not involved in this proceeding and need not now be decided. As I have already pointed out, the line between the Atlantic Ocean and the Gulf of Mexico in this area follows the meridian of 83° west longitude north from Cuba to the parallel of 24° 35′ north latitude and follows that parallel east to the Marquesas Keys.

I accordingly find that the present marine boundary of the State of Florida within the meaning of the Submerged Lands Act and which is effective for the purposes of that Act, on both the Atlantic and Gulf coasts, may be precisely defined and located as follows:

> *Marine boundary of the mainland and Florida Keys.* Beginning at a point in the middle of the St. Mary's river at its mouth in the Atlantic Ocean north of Amelia Island, and extending thence seaward in the Atlantic Ocean three geographical miles from the coastline; thence in a general southerly direction following the coastline of the State and of the Florida Keys and three geographical miles seaward therefrom to a point in latitude 24° 35′ north which is three geographical miles westwardly from the coast of the most westerly of the Marquesas Keys; thence due west in latitude 24° 35′ north to a point which is three marine leagues westwardly from the most westerly of the Marquesas Keys; thence in a general northerly direction following the coastline of the Marquesas Keys, the lower Florida Keys, the seaward limit of the inland waters of Florida Bay and the coastline of the mainland and three marine leagues seaward therefrom to a point west of the mouth of the Perdido river and three marine leagues distant therefrom; and thence to the mouth of the Perdido river.

The Dry Tortugas Islands are a part of the territory of the State of Florida. They were included within the State boundary described in the State Constitution of 1868 which, as we have seen, was approved by Congress in

1868 and their status as Florida territory has never been questioned. But for the purposes of the State boundary recognized by the Submerged Lands Act these islands must be regarded as constituting detached insular territory of the State with a separate boundary of their own. Applying the principles heretofore discussed, I find that the boundary of the State in the area of the Dry Tortugas Islands may be defined as follows:

> *Marine boundary of the Dry Tortugas Islands.* Beginning at a point in latitude 24° 35′ north three geographical miles southeastwardly from the coastline of Garden Key or any low-tide elevation which is southeastwardly from Garden Key and within three geographical miles thereof; thence in a general westwardly direction following a line three geographical miles seaward from the coastline of the nearest of the Dry Tortugas Islands and low-tide elevations to a point in latitude 24° 35′ north three geographical miles southwestwardly from Loggerhead Key or any low-tide elevation which is southwestwardly from Loggerhead Key and within three geographical miles thereof; thence due west in latitude 24° 35′ north to a point in longitude 83° west; thence due south in longitude 83° west to a point three marine leagues southwestwardly from Loggerhead Key or any low-tide elevation which is southwestwardly from Loggerhead Key and within three geographical miles thereof; thence in a general northwestwardly, eastwardly, and southwardly direction following a line three marine leagues seaward from the nearest of the Dry Tortugas Islands and low-tide elevations to a point in latitude 24° 35′ north; and thence due west in latitude 24° 35′ north to the place of beginning.

Included in the appendix is a reproduction of a section of Coast & Geodetic Survey Chart C. & G.S. 1113 [United States Exhibit No. 37] on which are indicated the boundary

lines claimed by the State of Florida and the United States, respectively, and the boundary line of the State in the disputed area as recommended above by me. On Coast & Geodetic Survey Charts C. & G.S. 1250, 1251 and 1253 also reproduced in the appendix, is indicated the seaward limit of the inland waters of Florida Bay and on Coast & Geodetic Survey Charts C. & G.S. 1251, 1252, 1253 and 1351, likewise reproduced in the appendix, is indicated the location of portions of the boundary line of the State in the Gulf of Mexico as recommended above by me. [Charts C. & G.S. 1250, 1251, 1252, 1253 and 1351 are parts of United States Exhibit No. 101].

7. The character and extent of Florida Bay as a juridical or historic bay constituting inland waters of the State.

It remains to define the coastline of the State of Florida which constitutes the baseline seaward from which, three geographical miles in the Atlantic Ocean and three marine leagues in the Gulf of Mexico, the marine boundaries of the State are located. Before doing so, however, a preliminary problem must be dealt with. This involves the area of the Gulf of Mexico between the Florida Keys and the mainland of the State lying southeast of a straight line bearing 045° from north running from the Dry Tortugas to the vicinity of Cape Romano which entire area the State calls Florida Bay and which it claims to be inland waters of the State on the basis, as it contends, that the area comprises a juridical bay or that it has historically been treated as inland waters of the State.

Section 2(c) of the Submerged Lands Act defines the term "coast line" as meaning "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters". The parties by the stipulation contained in their joint prehearing statement have agreed that the determination of the coastline shall be governed

by pertinent articles of the Convention on the Territorial Sea and the Contiguous Zone. 15 U.S.T. (Pt. 2) 1606. This accords with the decision of the Court in *United States v. California,* 1965, 381 U.S. 139, 164-165, which held that the definitions supplied by that Convention should be followed in determining the meaning of "inland waters" and other similar, but undefined, phrases used in the Submerged Lands Act. Article 7 of the Convention defines and deals with what we may call juridical bays. That article is as follows:

"ARTICLE 7

"1. This article relates only to bays the coasts of which belong to a single State.

"2. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

"3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water areas of the indentation.

"4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn

between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

"5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

"6. The foregoing provisions shall not apply to so-called 'historic' bays, or in any case where the straight baseline system provided for in article 4 is applied."

It will be seen that the Convention lays down two criteria for a juridical bay. It must be a well-marked indentation of the coast which contains landlocked waters. The length of the closing line marking the seaward limit of the inland waters of the bay must not exceed 24 miles. Neither of these criteria is met by the area which the State of Florida claims as Florida Bay. The distance between the Dry Tortugas and Cape Romano, the two entrance points to that area which the State regards as the termini of the closing line of the bay, is about 100 miles, vastly more than the 24 miles stipulated by the Convention, and the enclosed waters are not landlocked, since the Dry Tortugas, the Marquesas Keys and the other lower Florida Keys which enclose the area on the south are all islands with channels of open water between them connecting the waters of the Gulf of Mexico to the north with the waters of the Straits of Florida to the south. The vast area claimed as a juridical bay by the State of Florida is, therefore, not a bay, the waters of which are internal waters of the State, within the controlling definition of the Convention on the Territorial Sea and the Contiguous Zone.

I do not think that this conclusion need be reached

with respect to the most easterly portion of this area, however, namely, the area between the mainland on the northwest and the upper Florida Keys on the southeast which lies east of a closing line running southwesterly from East Cape of Cape Sable to Knight Key in the Florida Keys, a distance of approximately 24 geographical miles. This area comprises for the most part very shallow water which is not readily navigable and nearly all of which is dotted with small islands and low-tide elevations. I find that this area is sufficiently enclosed by the mainland and the upper Florida Keys, which constitute realistically an extension of the mainland, to be regarded as a bay which constitutes inland waters of the State within the test applied in *United States v. Louisiana,* 1960, 363 U.S. 1, 66-67, fn. 108, and *United States v. Louisiana,* 1969, 394 U.S. 11, 60-66, and discussed in *United States v. California,* 1965, 381 U.S. 139, 171. Moreover, the character of this area as inland waters of the State of Florida appears to be conceded by the United States. It is this area which I designate in this report as Florida Bay. But the claim of the State to the waters of the Gulf of Mexico to the west of this area as a juridical bay must, in my opinion, be rejected.

I turn then to consider the proposition upon which the State of Florida places its principal reliance, namely, that the waters of the extensive area which it claims as Florida Bay are historically inland waters of the State, an historic bay within the meaning of the saving clause of paragraph 6 of Article 7 of the Convention on the Territorial Sea and the Contiguous Zone. In *United States v. California,* 1965, 381 U.S. 139, the Court was called upon to pass upon the claim of the State of California that certain bays along its coast were "historic bays" the waters of which were, for that reason, historic inland waters of the State. Discussing the legal concept of "historic bays" in international law and referring to Juridical Regime of Historic Waters, Including Historic Bays, U.N. Doc. A/CN. 4/143 (1962), the Court said [p. 172]:

> "Essentially these [historic bays] are bays over which a coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations."

In rejecting the claims of the State of California, the Court pointed out that "The United States disclaims that any of the disputed areas are historic inland waters," and said [p. 175]:

> "We are reluctant to hold that such a disclaimer would be decisive in all circumstances, for a case might arise in which the historic evidence was clear beyond doubt. But in the case before us, with its questionable evidence of continuous and exclusive assertions of dominion over the disputed waters, we think the disclaimer decisive."

In *United States v. Louisiana*, 1969, 394 U.S. 11, the Court was faced with similar problems with respect to the coastline of the State of Louisiana. In discussing the doctrine of the international law relating to historic internal waters the Court, while pointing out [p. 75] that there is no universal accord on its exact meaning, stated in footnote 27 [pp. 23-24]:

> "27. A recent United Nations study recommended by the International Law Commission reached the following conclusions:
>
> " 'There seems to be fairly general agreement that at least three factors have to be taken into consideration in determining whether a State has acquired a historic title to a maritime area. These factors are: (1) the exercise of authority over the area by the State claiming the historic right; (2) the continuity of this exercise of authority; (3) the attitude of foreign States. First, the State must exercise authority over the area in question in order to acquire a historic title to it. Secondly, such exercise of authority must

> have continued for a considerable time; indeed it must have developed into a usage. More controversial is the third factor, the position which the foreign States may have taken towards this exercise of authority. Some writers assert that the acquiescence of other States is required for the emergence of an historic title; others think that absence of opposition by these States is sufficient.' Juridical Regime of Historic Waters, Including Historic Bays, [1962] 2 Y.B. Int'l L. Comm'n 1, 13, U. N. Doc. A/CN. 4/143 (1962)."

From these opinions of the Court and the authorities upon which they rely, I conclude that the criteria for establishing the existence of an historic bay or historic inland waters are three. First, there must be an open, notorious and effective exercise of sovereign authority over the area not merely with respect to local citizens but as against foreign nationals as well; second, this authority must have been exercised for a considerable period of time; and, third, foreign states must have acquiesced in the exercise of this authority as against their nationals.

The extent of the limits of sovereign jurisdiction in the maritime belt along the coasts of the United States is a political question for the federal government, to be determined by its legislative and executive branches. *United States v. California*, 1947, 332 U.S. 19, 33-34. It would follow that a disclaimer by the United States of jurisdiction in any part of that area should, as the Court indicated in *United States v. California*, 1965, 381 U.S. 139, 175, ordinarily bar any claim to such jurisdiction by the state involved. The Court there pointed out, however, as we have seen, that the evidence supporting a state's historic claim might be clear beyond doubt, in which case the federal disclaimer would not be decisive. And in *United States v. Louisiana*, 1969, 394 U.S. 11, 75-77, the Court held that in a controversy in this field between a state and the United States, the state may, in support of

its claim to historic inland waters, rely upon evidence of its own state activities in the area as well as any activities of the United States.

In the present case, the United States takes the position that it has disclaimed any historic title to or sovereign jurisdiction over the extensive area which the State of Florida claims as Florida Bay. In *United States v. California*, 1965, 381 U.S. 139, the disclaimer of the United States in the litigation itself was held sufficient to bar the state claim. Here there is not only disclaimer in the litigation but additional evidence of activities and statements by officials of the United States of continued disclaimers of historic title to the waters in question. Included in this evidence is a series of maps of the coastline [United States Exhibit No. 101] which indicate the extent of the claim of the United States to the territorial sea along the coast of Florida and which were furnished to foreign nations for their information. The burden, therefore, is cast upon the State of Florida to establish by historic evidence which is "clear beyond doubt" that its historic claim meets the three criteria which I have described above and may, therefore, be sustained as against the federal disclaimer.

I turn then to consider the evidence which the State of Florida has offered in support of its claim. First, of course, is the boundary claimed by the 1868 Constitution approved by Congress which it asserts includes the entire area southeast of a straight line bearing 045° from north from the Dry Tortugas to Cape Romano which entire area it calls Florida Bay, as I have said, and claims as historic inland waters. If its construction of the boundary language is correct, which I have concluded it is not, this 1868 origin of its claim would certainly be remote enough in time to satisfy the second criterion for historic inland waters.

The first and third criteria, however, must also be met. The State must show that it, or the United States, exercised open, notorious and effective sovereign authority

in the area as against the nationals of foreign states and that the foreign states acquiesced in this exercise of authority. As to this, the evidence submitted by the State is limited indeed. There is no evidence whatever that the federal government either claimed or exercised such authority over the area beyond the coastal belt of territorial sea recognized by maritime states. The evidence offered by the State that in 1826 a federal revenue cutter drove off "Bahama Turtlers who have heretofore occupied the Florida coast in pursuit of that employment" [Florida Exhibit No. 74], seems clearly to have related to the belt of territorial sea along the coasts of the Keys and the shallow waters between them where it appears that turtles were taken. The exercise of authority within that coastal belt would, of course, have no bearing at all on the question whether sovereign authority had been exercised and enforced on the high seas beyond the limits of that belt.

The State offered a series of maps dating back to 1854 which more or less clearly designate as Florida Bay the area now claimed by the State as its internal waters. I find, however, that this area has not been consistently treated by geographers and cartographers as a bay. Moreover, such a designation throws little or no light on the question whether the State actually exercised sovereign authority in the area.

The most common exercise of sovereignty in inland waters is the special control and, often, prohibition of navigation by foreign vessels and of fishing by foreign nationals. The State of Florida offered no evidence that either it or the federal government had ever attempted to control or prohibit the mere navigation by foreign vessels of the area in question. There is evidence, however, that as early as December 17, 1845, shortly after its admission to the Union, the State of Florida passed an act (Chapter 34) prohibiting non-residents without a license from taking fish in Florida waters for export or sale. This act was superseded on February 12, 1861 by an act(Chapter 1121)

which prohibited non-citizens of the State without a license from taking fish or turtle "on the coast, or in any of the seas, bays, rivers, creeks or harbors, or within a marine league of the coasts of said State" for export or sale. In 1893 the State passed an act (Chapter 4212) prohibiting non-citizens of the United States from catching food fishes for sale or export "in the public waters of the State" or without a license from taking "any fish within the jurisdiction of the State" for other than their own individual use. And in 1915 the State passed an act (Chapter 6877) declaring "all fish in the rivers, bayous, lagoons, lakes, bays, sounds and inlets bordering on or connected with the Gulf of Mexico or the Atlantic Ocean, or in the Gulf of Mexico or Atlantic Ocean, within the jurisdiction of the State of Florida" to be, and to continue and remain, the property of the State, to be taken and used by citizens and non-citizens under the restrictions and conditions imposed by the Act. It will be seen that all of these acts relate to the taking of fish within the "public waters of the State" or "within the jurisdiction of the State" without indicating except in one instance the distance from the coast to which those waters or that jurisdiction extended. And in the Act of 1861 which did specify that distance it was stated to be one marine league. The reference to "bays" in some of these acts was certainly inadequate to refer to the large expanse of the Gulf of Mexico which the State of Florida now claims as a bay. These acts appear to furnish little or no support for a finding that the State exercised authority in that area.

In 1957, subsequent to the enactment of the Submerged Lands Act, the State of Florida passed an act (Chapter 57-358) prohibiting shrimping by anyone in certain portions of the area with which we are here concerned, which the director of the Department of Conservation was authorized to close from time to time in the interest of conserving shrimp. These areas are described as the Tortugas shrimp bed. This Act was amended in

1961 (Chapter 61-470), and further amended in 1970 (Chapter 70-163) to extend the area of the Tortugas shrimp bed.

In 1963 the State enacted the Florida Territorial Waters Act (Chapter 63-202) the purpose of which was to exercise and exert full sovereignty and control over the territorial waters of the State. Section 4 of the Act made it unlawful for any unlicensed alien vessel to take any natural resource of the State's "territorial waters, as such waters are described by article 1 of the Constitution of Florida." It will be recalled that in 1963 the constitutional boundaries which described and delimited the territorial waters of the State were those set out in the 1962 Constitutional amendment and on the Gulf coast ran three marine leagues offshore from the Dry Tortugas, the Florida Keys and the mainland of the State. The Florida Territorial Waters Act, as enacted in 1963, accordingly did not purport to apply to the area beyond the three-league limit which is here in dispute.

Randolph Hodges, Executive Director of the Florida State Department of Natural Resources, testified that between 1957 and 1968 his department considered the State boundary north of the Keys to begin at the Dry Tortugas and run generally parallel with the Keys along their northern side back toward the mainland. It was in 1968, as we have seen, that the Constitutional boundary was extended out into the Gulf to enclose the entire area here in question. It seems clear from the evidence that the State of Florida has never, before or since 1968, seized a foreign vessel in the disputed area beyond the three-league limit for violating its laws. Mr. Hodges so testified and Dr. Samuel Proctor, another witness for the State, corroborated this fact. The nearest approach to a suggestion of such action is a statement in the complaint filed on December 18, 1970 by the United States against the State of Florida in the United States District Court for the Northern District of Florida, Civil Action No. 1672, Talla-

hassee, that the State of Florida was threatening to arrest foreign boats fishing for shrimp in the area in dispute. It was not alleged, however, that the State had actually done so.

The only other evidence in support of the State's claim to the area in dispute which need be mentioned is the fact that the State on October 4, 1941 granted an option to lease large tracts of submerged lands in the area for oil exploration. Leases were subsequently granted to private individuals and corporations in 1944, 1949 and 1951. Actual exploration was conducted with negative results and the leases expired in 1964 and were not renewed. It will be seen that the leases were given only nine years, at the earliest, before the enactment of the Submerged Lands Act and have all since terminated. They do not disclose a usage sufficiently remote in time to meet the second criterion for historic inland waters. Nor do I think that they afford evidence of a use adverse to foreign nations in light of the accepted view in recent years that maritime nations have special rights in the bed of the continental shelf off their coasts.

The State of Florida is here claiming that all the waters of the Gulf of Mexico southeast of a straight line from the Dry Tortugas running due northeast to Cape Romano on the mainland are historic inland waters of the State. I am satisfied, however, that the evidence offered in support of this claim does not meet the test of being clear beyond doubt. The claim must, therefore, be rejected. However, as I have already indicated, that portion of the area lying east of a straight line from the East Cape of Cape Sable to Knight Key is a juridical bay, the waters of which are inland waters of the State of Florida. It is this area which I have designated Florida Bay in this report.

Before concluding my discussion of Florida Bay I should point out that it could be argued that the lower

Florida Keys, being basically part of the same partly submerged limestone reef as the upper Keys, should likewise realistically be regarded as an extension of the mainland and that, accordingly, Key West, rather than Knight Key, is the natural southern entrance point of Florida Bay. Under this theory the closing line marking the seaward limit of the inland waters of Florida Bay would have to be drawn from the East Cape of Cape Sable to the Spanish Banks low-tide elevation which is about two miles northeast of Big Spanish Key. This would provide a closing line approximately 24 miles long, the maximum length for such a line which is permitted by paragraph 4 of article 7 of the Convention on the Territorial Sea and the Contiguous Zone. I have not accepted this alternative, however, because of the existence of a gap in the chain of the Keys just west of Knight Key, through which gap passes the Moser Channel between the Straits of Florida and the Gulf of Mexico with navigable depths of water of from 10 to 15 feet. I have concluded that this navigable channel so far separates the lower Florida Keys from the upper Keys as to negate a finding that the former should be regarded as a further extension of the mainland.

8. The location of the coastline of the State.

It is necessary to define and locate the coastline of the State of Florida because it comprises the baseline seaward from which the boundaries of the State are to be measured and located. In proceeding to define this coastal baseline I am met at the threshold by the contention of the State that the system of straight baselines must be used for this purpose in the region of the Florida Keys and the Dry Tortugas. The situations in which such straight baselines may be used and the effect of their use are set out in Articles 4 and 5 of the Convention on the Territorial Sea and the Contiguous Zone, as follows:

"ARTICLE 4.

"1. In localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

"2. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.

"3. Baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them.

"4. Where the method of straight baselines is applicable under the provisions of paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage.

"5. The system of straight baselines may not be applied by a State in such a manner as to cut off from the high seas the territorial sea of another State.

"6. The coastal State must clearly indicate straight baselines on charts, to which due publicity must be given."

"ARTICLE 5.

"1. Waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.

"2. Where the establishment of a straight baseline in accordance with article 4 has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage, as provided in articles 14 to 23, shall exist in those waters."

The parties have stipulated, as we have seen, that the determination of the coastline shall be governed by pertinent articles of the Convention and the State urges that Article 4 specifically authorizes the employment of the method of straight baselines for this purpose in an insular area such as the Florida Keys. This may be conceded but the concession does not support the State's position. For the Court has expressly held "that the choice under the Convention to use the straight-base-line method for determining inland waters claimed against other nations is one that rests with the Federal Government, and not with the individual States." *United States v. California,* 1965, 381 U.S. 139, 168. This position was reaffirmed by the Court in *United States v. Louisiana,* 1969, 394 U.S. 11, 72-73.

The evidence in this case conclusively establishes that the United States has not adopted the straight baseline method with respect to the determination of the coastline of the State of Florida. Therefore, for determining the location of the coastline we must apply the criteria which are supplied by the Submerged Lands Act, namely, the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters. In applying these criteria in the case of islands which realistically, within the rule applied in *United States v. Louisiana,* 1969, 394 U.S. 11, 60-66, should be treated as extensions of the mainland and as enclosing the inland waters of a bay, such, for example, as Key Biscayne, Key Largo, Plantation Key, Upper and Lower Matecumbe Keys, Long Key and Vaca Key, the line of ordinary low water along that portion of their coast which is in direct contact with the open sea

should be treated as part of the coastline of the mainland. *United States v. Louisiana*, 1960, 363 U.S. 1, 66-67, fn. 108. Likewise the seaward limits of bays, harbors and river mouths, as defined by Articles 7, 8 and 13, respectively, of the Convention on the Territorial Sea and the Contiguous Zone, constitute part of the coastline of the mainland, and the same applies to the western seaward limit of Florida Bay, as I have defined it, which will also constitute a part of the coastline of the State. In the case of an island belonging to the State which is not within or contiguous to inland waters of the State, its entire coast constitutes a baseline for determining part of the boundary of the State as indicated by Article 10 of the Convention on the Territorial Sea and the Contiguous Zone. In the case of a low-tide elevation situated wholly or partly within three geographical miles from the coastline of the mainland or of an island, the low-water line of that elevation may also be used as the baseline for determining part of the boundary of the State as indicated by Article 11 of the Convention on the Territorial Sea and the Contiguous Zone.

The text of Article 7 of the Convention is set out in the discussion of Florida Bay earlier in this report. Articles 8, 10, 11 and 13 are as follows:

"ARTICLE 8.

"For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast."

"ARTICLE 10.

"1. An island is a naturally-formed area of land, surrounded by water, which is above water at high-tide.

"2. The territorial sea of an island is measured in accordance with the provisions of these articles."

"ARTICLE 11.

"1. A low-tide elevation is a naturally-formed area of land which is surrounded by and above water at low-tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.

"2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own."

"ARTICLE 13.

"If a river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low-tide line of its banks."

These provisions of the Convention by their language deal only with the location of the baseline from which the breadth of the territorial sea is to be measured. However, the baseline which they define is identical with the coastline as defined by the Submerged Lands Act, and the outer limit of the territorial sea to which they refer, which is three miles seaward from the coastline, is identical with the maritime boundary on the Atlantic coast to which I have found the State of Florida to be entitled for the purposes of the Submerged Lands Act. These provisions of the Convention are thus, as the parties have stipulated, directly applicable to the determination of the location of the coastline for boundary purposes in this proceeding.

The United States offered in evidence a series of Coast and Geodetic Survey charts of the entire coastline of the State of Florida from the mouth of the St. Mary's river to the mouth of the Perdido river, including the Florida Keys and the Dry Tortugas Islands. [United States Exhibit No. 101]. On each chart the Federal Government has drawn lines three geographical miles and 12 geographical miles, respectively, seaward from the coastline to identify the territorial sea and the contiguous zone. The charts are designated C. & G.S. Nos. 1242 to 1265, inclusive, and 1351. They have been distributed by the Federal Government to foreign governments upon their request for information as to the limits of the territorial sea and contiguous zone claimed by the United States. The location of the coastline between the St. Mary's river and the seaward limit of Biscayne Bay, and from Cape Sable to the mouth of the Perdido river as claimed by the United States and not contested by the State of Florida may be ascertained from Charts C. & G.S. 1242 to 1248, inclusive, and 1253 to 1265, inclusive.

The coastline on the Atlantic Ocean south of Biscayne Bay follows the ordinary low-water mark on the southeastern or seaward coast of the islands in the chain of the upper Florida Keys and the low-tide elevations adjacent to them as far west as Knight Key off the western tip of Vaca Key, with closing lines from key to key to delimit the inland waters lying between and to the north of them. From Knight Key the coastline follows the seaward limit of Florida Bay in a straight line northeastwardly to the East Cape of Cape Sable. The remaining islands, in the main chain of the Keys west of Knight Key, comprise three groups which may be considered separately, the lower Florida Keys from Money Key to Key West, the Marquesas Keys and the Dry Tortugas Islands. In the case of each group the narrow waters within the group are inland waters of the State of Florida and the coastline follows the ordinary low-water line along those portions

of the coast of the outer islands and low-tide elevations of the group which are in direct contact with the open sea and straight lines drawn between those islands and low-tide elevations to mark the seaward limit of the inland waters between and behind them. The islands, keys, and adjacent low-tide elevations, together with those rocks which protrude above ordinary high-water, on the Florida Reefs and elsewhere not in the immediate vicinity of the main chain of the Florida Keys to which I have referred, have in each instance an individual coastline following the ordinary low-water mark along its coast, distinct from the coastline of the mainland and main chain of the Florida Keys. From these detached insular coastlines, segments of the State boundary are, of course, to be determined.

From the stipulation of the parties and the evidence, including particularly the charts of the Coast and Geodetic Survey designated C. & G.S. 1242, 1243, 1248, 1249 and 1250 which have been received in evidence and are included in the appendix to this report, I find that the following lines mark the outer limits of inland waters, and thus the coastline, at the places indicated:

(1) A line between the outer limits of the jetties at the mouth of the St. Mary's river;

(2) A line between the outer limits of the jetties at the mouth of the St. John's river;

(3) A line between Fisher Island and Virginia Key;

(4) A line between Virginia Key and Key Biscayne;

(5) A line between Cape Florida and Ragged Key;

(6) A line between Ragged Key and Boca Chita Key;

(7) A line between Boca Chita Key and Sands Key;

(8) A line across the mouth of Caesar Creek;

(9) A line across the mouth of Broad Creek;

(10) A line across the mouth of Angelfish Creek;

(11) A line across the mouth of Tavernier Creek;

(12) A line across the mouth of Snake Creek;

(13) A line between Windley Key and Upper Matecumbe Key;

(14) A line between Upper Matecumbe Key and Teatable Key;

(15) A line between Teatable Key and Indian Key;

(16) A line between Indian Key and Lower Matecumbe Key;

(17) A line between Lower Matecumbe Key and Craig Key;

(18) A line between Craig Key and the most easterly point of Long Key;

(19) A line between Long Key and the easternmost of the Conch Keys;

(20) A line between the Conch Keys;

(21) A line between the westernmost of the Conch Keys and Duck Key;

(22) A line between Duck Key and the Toms Harbor Keys;

(23) A line between the Toms Harbor Keys and Grassy Key;

(24) A line between Grassy Key and Crawl Key;

(25) A line between Crawl Key and the easternmost of the Deer Keys;

(26) Lines between each of the outer Deer Keys;

(27) A line between the southwesternmost of the Deer Keys and the low-tide elevation adjoining Vaca Key on the south;

(28) A line across the mouth of Sister Creek;

(29) A line between Boot Key and Knight Key;

(30) A line between Knight Key and the East Cape of Cape Sable.

The location of the foregoing closing lines is indicated on Coast and Geodetic Survey Charts C. & G. S. 1242, 1243,

1248, 1249 and 1250 which are included in the appendix. Their exact location may well have to be determined by the parties with greater precision hereafter. Likewise the location of the coastline of the lower Florida Keys from Money Key to Key West as a group, of the Marquesas Keys as a group, and of the Dry Tortugas Islands as a group, will have to be determined by the parties hereafter in accordance with the criteria hereinabove stated. It is impossible for me on the record now before me to make a precise determination of the location of the coastline of these three groups of islands so far as concerns the closing lines marking the seaward limits of the narrow inland waters lying between the islands of each group. If the parties are unable to agree as to any of these closing lines application for further supplementary proceedings to determine them should be authorized by the Court.

It should also be understood that the location of some or all of these closing lines may be modified by future changes in the shoreline.

C. CONCLUSIONS

The conclusions to which I have come with respect to the subsidiary questions involved in this case are stated in connection with my discussion of those questions earlier in this report and most of them need not be repeated here. My conclusions with respect to the ultimate question involved may be stated as follows:

1. The State of Florida, prior to May 22, 1953, did not have title to or ownership of the seabed or the resources thereof seaward from its coastline in either the Atlantic Ocean or the Gulf of Mexico.

2. By the Submerged Lands Act of May 22, 1953, 67 Stat. 29, Congress granted to the State of Florida title to and ownership of the portion of the seabed and the natural resources of the seabed lying within the State boundaries approved by Congress but in no event extending from the coastline of the State more than three geographical miles into the Atlantic Ocean or more than three marine leagues into the Gulf of Mexico.

3. The line dividing the Gulf of Mexico on the northwest from the Atlantic Ocean on the southeast begins at a point on the northern coast of the island of Cuba in 83° west longitude, and extends thence to the northward along that meridian of longitude to 24° 35′ north latitude; thence eastward along that parallel of latitude through Rebecca Shoal and the Quicksands Shoal to the Marquesas Keys; and thence through the Florida Keys to the mainland at the eastern end of Florida Bay; all the narrow waters between the Dry Tortugas, the Keys and the mainland being within the Gulf of Mexico.

4. The boundary of the State of Florida in the Atlantic Ocean is a line from the mouth of the St. Mary's river to the Dry Tortugas at the uniform distance of three geographical miles seaward from the Atlantic coastline of the State. That boundary, which is described and claimed

in Article I of the State Constitution as amended in 1962, is the State boundary authorized and approved by section 4 of the Submerged Lands Act. 43 U.S.C.A. §1312.

5. The boundary of the State of Florida in the Gulf of Mexico is a line from the Dry Tortugas to the mouth of the Perdido river at the uniform distance of three marine leagues seaward from the coastline of the State. That boundary, which is described and claimed in Article I of the State Constitution of 1868, carried forward without change in the Constitution of 1885, and clarified and more precisely defined by the Constitutional Amendment of 1962, is the historic State boundary approved by Congress within the meaning of section 2 of the Submerged Lands Act. 43 U.S.C.A. §1301.

6. The waters between the mainland and the upper Florida Keys which lie east of a straight line drawn between the East Cape of Cape Sable and Knight Key comprise Florida Bay and constitute inland waters of the State of Florida and the closing lines between the several upper Florida Keys and the said line between the East Cape of Cape Sable and Knight Key mark the seaward limit of those inland waters.

7. The marine boundaries of the State of Florida referred to in my Conclusions 4 and 5 above, which delimit the grant of the seabed and the natural resources of the seabed and sea which were made to the State by the Submerged Lands Act, may be more precisely defined as follows:

> *Marine boundary of the mainland and Florida Keys.* Beginning at a point in the middle of the St. Mary's river at its mouth in the Atlantic Ocean north of Amelia Island, and extending thence seaward in the Atlantic Ocean three geographical miles from the coastline; thence in a general southerly direction following the coastline of the State and of the Florida

Keys and three geographical miles seaward therefrom to a point in latitude 24° 35′ north which is three geographical miles westwardly from the coast of the most westerly of the Marquesas Keys; thence due west in latitude 24° 35′ north to a point which is three marine leagues westwardly from the most westerly of the Marquesas Keys; thence in a general northerly direction following the coastline of the Marquesas Keys, the lower Florida Keys, the seaward limit of the inland waters of Florida Bay and the coastline of the mainland and three marine leagues seaward therefrom to a point west of the mouth of the Perdido river and three marine leagues distant therefrom; and thence to the mouth of the Perdido river.

Marine boundary of the Dry Tortugas Islands. Beginning at a point in latitude 24° 35′ north three geographical miles southeastwardly from the coastline of Garden Key or any low-tide elevation which is southeastwardly from Garden Key and within three geographical miles thereof; thence in a general westwardly direction following a line three geographical miles seaward from the coastline of the nearest of the Dry Tortugas Islands and low-tide elevations to a point in latitude 24° 35′ north three geographical miles southwestwardly from Loggerhead Key or any low-tide elevation which is southwestwardly from Loggerhead Key and within three geographical miles thereof; thence due west in latitude 24° 35′ north to a point in longitude 83° west; thence due south in longitude 83° west to a point three marine leagues southwestwardly from Loggerhead Key or any low-tide elevation which is southwestwardly from Loggerhead Key and within three geographical miles thereof; thence in a general northwestwardly, eastwardly, and southwardly direction following a line three marine leagues seaward from the nearest of the Dry Tortugas

Islands and low-tide elevations to a point in latitude 24° 35′ north; and thence due west in latitude 24° 35′ north to the place of beginning.

8. The coastline from which are to be measured the boundaries of the State of Florida as defined in Conclusion 7 is the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters of rivers and bays. The Convention on the Territorial Sea and the Contiguous Zone governs the determination, for boundary purposes under the Submerged Lands Act, of the location of the coastline of the mainland, of islands and of low-tide elevations, and the definition and determination of inland waters of the State.

9. The State of Florida is entitled, as against the United States, to the seabed and all the natural resources of the seabed and the sea within the boundaries just described and the United States is entitled, as against the State of Florida, to the seabed and all the natural resources of the seabed and the sea of the continental shelf seaward from those boundaries.

D. RECOMMENDATIONS

I recommend that the parties be directed to submit to the Court forms of a declaratory decree in accord with the foregoing findings and conclusions and drawn with the necessary technical precision to carry them fully into effect.

The decree should provide that each party bear its own costs and that the expenses of the special master be borne by the parties in equal shares. It should also reserve the jurisdiction of the Court to entertain such further proceedings, enter such orders and issue such writs as may from time to time be deemed necessary or advisable to supplement the decree and give it proper force and effect.

Respectfully submitted,

JAN 18 1974

~~December , 1973~~

ALBERT B. MARIS
Special Master

PREHEARING ORDER AS AMENDED

I. PRELIMINARY STATEMENT

This case consists of a consolidation of proceedings for entry of a supplemental decree to delimit Florida's submerged lands in the Gulf of Mexico, in United States v. Louisiana, et al., No. 9, Original, and proceedings to delimit Florida's submerged lands in the Atlantic Ocean severed from United States v. Maine, et al., No. 35, Original. By orders of June 28, 1971, the Supreme Court permitted institution of the supplemental proceedings in No. 9, Original, ordered severance of proceedings as to Florida in No. 35, Original, and ordered consolidation of the two proceedings into the present case, No. 52, Original, all in accordance with joint motions filed by the parties in both cases and with the report and recommendation, previously approved by both parties, filed by the undersigned as special master in No. 35, Original. At the same time, the Court referred this consolidated case, No. 52, Original, to the undersigned as special master.

On January 8, 1971, the special master entered an order in No. 35, Original, allowing Florida to file an amended answer therein, and on January 28, 1971, the State of Florida filed its amended answer, together with a counterclaim and demand for jury trial. On March 29, 1971, the United States moved to dismiss the counterclaim and to deny the demand for jury trial. The Supreme Court's order of June 28, 1971 allowed the State of Florida 60 days to respond to that motion. The State of Florida filed its response on August 27, 1971 and the issues raised by the motion and response were thereupon referred to the undersigned as special master.

On September 14, 1971 a prehearing conference with counsel was held at which the parties presented to the special master a joint prehearing statement, which stipulates certain facts and states the respective contentions of the parties. That prehearing statement is attached hereto

and is adopted as a part of this order. The prehearing statement may be amended at any time by agreement of the parties, or by order of the special master on application of either party.

In the light of the contentions of the parties as set out in their joint prehearing statement, the following questions, inter alia, appear to be presented to the special master for decision:

1. Did the Act of June 25, 1868 grant and convey to the State of Florida the right to all the natural resources of the seabed within the boundary described in the Florida Constitution of 1868?

2. Did the Submerged Lands Act grant and convey to the State of Florida the right to all the natural resources of the seabed within the boundary described in the Florida Constitution of 1868?

3. What effect, if any, did the boundary provisions in Florida's 1962 constitutional amendment and 1968 constitutional revision have upon whatever rights the State may have obtained in the seabed adjacent to its coast by virtue of its 1868 Constitution?

4. What is the geographical location of the boundary described in the Florida Constitution of 1868?

5. What is the present coastline between the Northern Jetty at Miami Harbor and Cape Romano, insofar as it affects the location of lines three geographical miles or nine geographical miles seaward therefrom?

6. Is Florida Bay an historic bay?

7. Is Florida Bay a juridical bay?

8. What waters within three leagues of the coast of Florida are in the Gulf of Mexico?

9. What is the seaward limit of the area of the Gulf of Mexico and the Atlantic Ocean in which the State of Florida is entitled to develop the natural resources of the seabed, seaward of which such rights, as against the State of Florida, belong exclusively to the United States?

II. PROCEDURE

To govern the conduct of further proceedings herein, It Is Ordered:

Testimony of Witnesses

1. The testimony in chief of witnesses, including their statements of their training, experience and qualifications, shall be reduced to writing, preferably in question and answer form, and copies thereof shall be furnished to the special master and to counsel for the other party not less than four weeks before the beginning of the hearing at which the witness is to be called upon to testify. The opposing party shall have the right to defer cross-examination for a reasonable period of time, to be determined in each instance by the special master, in order to afford such party an opportunity to study the testimony of the witness and to prepare for cross-examination, except where such an opportunity is manifestly not required. Not later than one week before commencement of the hearing at which the testimony is to be given, the opposing party shall notify the proponent and the special master whether it expects to cross-examine the witness at the conclusion of his direct testimony or to defer part or all of its cross-examination until a later hearing.

Exhibits; Documents; Distribution

2. Copies of exhibits proposed to be offered in evidence shall be furnished to opposing counsel at least four weeks prior to commencement of the hearing at which the exhibits are to be offered in evidence. An exhibit comprising a handwritten document shall be accompanied by a typewritten or printed copy and an exhibit comprising a document written in a language other than English shall be accompanied by an English translation, certified by the custodian or translator, if practicable. In the case of ex-

hibits comprising documents from public sources, copies need not be furnished if they are readily available to the public and an accurate description of the document and of the place where copies may be procured are furnished to counsel for the other party at least four weeks in advance of the hearing at which the exhibits are to be offered in evidence. The party offering an exhibit shall furnish one copy to the special master in addition to the original exhibit.

3. The State of Florida will send 25 copies of all printed pleadings, motions, memorandums and briefs and one copy of all typewritten motions, memorandums, briefs and correspondence to the Solicitor General of the United States as well as one copy of such typewritten motions, memorandums, briefs and correspondence to Bruce C. Rashkow, Esq., Marine Resources Section, Land and Natural Resources Division, United States Department of Justice.

4. The United States will send 5 copies of all printed pleadings, motions, memorandums and briefs and two copies of all typewritten motions, memorandums, briefs and correspondence to the Attorney General of the State of Florida for the attention of W. Robert Olive, Esq.

5. All copies of exhibits or of documents shall be of the same kind and quality as the corresponding exhibit or document in evidence.

Designation of Exhibits

6. Exhibits shall be numbered by the parties for identification prior to being furnished to opposing counsel and offered in evidence, and shall be designated by the same numbers when placed in evidence. Plaintiff's exhibits shall be designated and numbered, consecutively, thus: "United States Exhibit No. 1", etc., and defendant's exhibits: "Florida Exhibit No. 1", etc.

Authentication of Exhibits

7. Copies of documents may be introduced for submission into evidence in lieu of originals. The authenticity of a document and accuracy of a copy need not be proved if copies of the document have been submitted to opposing counsel and the proponent is not requested within two weeks after such submission to prove the authenticity of the document or the accuracy of the copy, or both. Either party may, however, controvert by evidence the authenticity of a document or accuracy of a copy at any time.

Judicial Notice

8. A party intending to ask the special master to take judicial notice of a document or other fact at any hearing shall notify opposing counsel of such intention at least four weeks prior to commencement of the hearing at which the request is to be made. If judicial notice of a document is involved, the notification to the other party shall be accompanied by a copy of the document if practicable.

9. All documents that are subject to judicial notice, copies of which are furnished to the special master and opposing counsel for their convenience, shall be designated in the same manner as documents which the parties offer as evidence. The designation as exhibits of documents that are subject to judicial notice will in no way enhance their probative effect.

10. If any material is submitted to the special master by either of the parties, copies thereof shall be made available by such party to the other party at or before the time of such submission.

Objections to Evidence

11. The special master shall ordinarily rule upon objections to evidence or exhibits at the time the objections are made with leave to the objecting party, in case the objection is overruled, and if so advised, to make a motion

to strike the testimony or exhibit after the examination and cross-examination with respect thereto have been completed.

Requests for Findings of Fact and Conclusions of Law
[as amended November 8, 1973]

12. At times hereafter to be fixed by the special master following the close of the hearings, the parties shall submit to the special master their requests for findings of fact and conclusions of law.

Court Reporter; Transcript of Hearings

13. The parties have agreed to employ a competent court reporter to report the special master's hearings. The parties will make their own arrangements with the reporter for the number of copies of the transcript, daily or otherwise, that they desire for their own use. In addition, the parties will arrange with the reporter to provide the original and one copy of the transcript for the use of the special master and for ultimate filing in the Supreme Court. The parties shall arrange for such corrections to the transcript as they may agree to or as may be directed by the special master.

Record

14. The record in this case includes the following materials in the files of the Supreme Court in Nos. 9 and 35, Original.

(a) Items from the files in No. 9 Original:

(i) Amended Complaint and Statement with Respect to Amended Complaint;

(ii) Defenses [of Florida] to Amended Complaint;

(iii) Opinion of the Court, United States v. Louisiana, et al., filed May 31, 1960, 363 U.S. 1;

(iv) Opinion of the Court, United States v. Florida, filed May 23, 1960, 363 U.S. 121;

(v) Decree, United States v. Louisiana, et al., entered December 12, 1960, 364 U.S. 502;

(vi) Joint Motion of the United States and the State of Florida to Initiate Supplemental Proceedings; To Consolidate Proceedings; To Appoint a Special Master; and For Entry of a Supplemental Decree; and Memorandum in Support of Motion;

(b) Items from the files in No. 35, Original:

(i) Motion for Leave to File Complaint, Complaint, and Brief in Support of Motion;

(ii) Motion of the United States for Judgment, and Brief in Support of Motion;

(iii) Motion for Severance of the State of Florida and for the Appointment of a Special Master, and Brief in Support of Motion;

(iv) Amended Answer of the State of Florida;

(v) Joint Motion of the United States and the State of Florida to Consolidate Proceedings Herein Against the State of Florida with United States v. State of Louisiana, et al., No. 9, Original, and Memorandum in Support of Motion;

(vi) Motion by the United States to Dismiss the Counterclaim and Deny the Demand for Jury Trial Filed by the State of Florida and Memorandum in Support of Motion;

(vii) Report of the Special Master Upon Motion of the State of Florida for Severance;

(c) Such other materials in the files in Nos. 9 and 35, Original, as may be designated hereafter by either party or by the special master.

ALBERT B. MARIS

September 22, 1971 *Special Master*

JOINT PREHEARING STATEMENT

The United States and the State of Florida jointly submit the following prehearing statement.

I. PREAMBLE

The purpose of this proceeding is to determine the seaward limit of the area of the Gulf of Mexico and the Atlantic Ocean in which the State of Florida is entitled as against the United States to develop the natural resources of the seabed insofar as it has not heretofore been determined by the Supreme Court.

II. STIPULATION

A. The United States recognizing that its motion for judgment on the pleadings in No. 35, Original is inapplicable in these severed and consolidated proceedings withdraws that motion from consideration in this case.

B. Noting that the location of the coastline of the State of Florida is material to the determination of the respective rights of the parties in the Gulf of Mexico and the Atlantic Ocean, the parties stipulate that, except as otherwise put in issue by the contentions of the parties herein stated, the coastline of Florida is:

1. The line of mean low-water along the coast as marked on the largest scale charts developed or to be developed by the National Ocean Survey or its predecessor the United States Coast and Geodetic Survey:

2. The following lines marking the outer limits of inland waters:

(a) At St. Marys River, a line between the outer limits of the jetties;

(b) At St. Johns River, a line between the outer limits of the jetties;

3. At Biscayne Bay:

(a) A line between Fisher Island and Virginia Key;

(b) A line between Virginia Key and Key Biscayne;

(c) A line between Cape Florida and Ragged Key;

(d) A line between Ragged Key and Boca Chita Key;

(e) A line between Boca Chita Key and Sands Key;

(f) A line across the mouth of Ceasar Creek;

(g) A line across the mouth of Broad Creek.

The approximate locations of the lines described in paragraph 2 are illustrated on Exhibit A attached hereto; but it is understood that the exact location of those lines may be determined with greater precision hereafter, and that the location of those lines may be modified by future changes in the shoreline.

The determination of the coastline not otherwise provided herein shall be governed by pertinent articles of the Convention on the Territorial Sea and the Contiguous Zones adopted by the United Nations Conference at Geneva, 1958 and ratified by the United States on March 24, 1961, 15 U.S.T. (Pt. 2) 1606.

III. CONTENTIONS

The parties make the following contentions:

A. *The United States contends —*

1. That the State of Florida has no rights in the natural resources of the seabed seaward of the coastline, except as granted by the Submerged Lands Act.

2. That the Submerged Lands Act granted to Florida the rights to the natural resources of the seabed only as follows:

(a) In the Atlantic Ocean, within three geographical miles of the coastline as defined in the Submerged Lands Act;

(b) In the Gulf of Mexico, within the boundary of Florida as that boundary was described in the Florida Constitution of 1868 and was located on June 25, 1868, but in no event less than three geographical miles nor more than three marine leagues (nine geographical miles) seaward from the coastline as defined in the Submerged Lands Act, as that coastline exists at any given time.

3. That the Gulf of Mexico is divided from the Atlantic Ocean by a line running due north along the meridian of longitude 83° W., from the coast of Cuba to latitude 24° 35′ N.; thence due east along the parallel of latitude 24° 35′ N. to Rebecca Shoal, at longitude 82° 35′ W.; thence through the shoals and Florida Keys to the mainland at the eastern end of Florida Bay, all the narrow waters between the Dry Tortugas and the mainland being considered to be within the Gulf.

4. That the boundary described in the Florida Constitution of 1868 should be construed, according to the facts as they existed in 1868, in a manner to be described by the United States after completing consultations with its experts.

5. That the body of water designated as Florida Bay is neither a juridical bay nor an historic bay.

6. That no system of straight baselines can be given effect unless the coastal nation has expressly adopted such a system and that the United States has never adopted such a system for the coast of Florida or any other part of the coast.

7. That if, contrary to the first contention of the United States, the State of Florida, independently of the Submerged Lands Act, had rights in the natural resources

of the seabed seaward of the coastline within the boundary described in its 1868 Constitution, then the State of Florida has relinquished those rights to the extent that areas included in the boundary described in the 1868 Constitution lie seaward of the boundary described in the 1885 Constitution, as amended November 6, 1962.

8. That, as against the State of Florida, the United States has the exclusive right to explore the continental shelf and exploit its natural resources in the area to be described by the United States after completing consultations with its experts.

B. *The State of Florida contends* —

1. That by virtue of the Act of June 25, 1868, Congress expressly or impliedly conveyed and granted to the State of Florida the rights and interests in title possessed by the United States in the area encompassed by the boundary described in the Florida Constitution of 1868, which rights include ownership of the submerged lands and resources.

2. That the boundary described in the Florida Constitution of 1868 should be construed as follows:

> * * * ; thence in a straight line to the head of the St. Marys River; thence down the middle of said river to the Atlantic Ocean; thence due east to the edge of the Gulf Stream or a distance of three geographic miles whichever is the greater distance; thence in a southerly direction along the edge of the Gulf Stream or along a line three geographic miles from the Atlantic coastline and three leagues distant from the Gulf of Mexico coastline, whichever is greater, to and through the Straits of Florida and westerly, including the Florida reefs, to a point due south of and three leagues from the southernmost point of the Marquesas Keys; thence westerly along a straight line to a point due

south of and three leagues from Loggerhead Key, the westernmost of the Dry Tortugas Islands; thence westerly, northerly and easterly along the arc of a curve three leagues distant from Loggerhead Key to a point due north of Loggerhead Key; thence northeast along a straight line to a point three leagues from the coastline of Florida; thence northerly and westerly three leagues distant from the coastline to a point west of the mouth of the Perdido River three leagues from the coastline as measured from a line bearing south 0° 01′ 00″ west from the point of beginning; thence northerly along said line to the point of beginning. The State of Florida shall also include any additional territory within the United States adjacent to the Peninsula of Florida lying south of the St. Marys River, east of the Perdido River, and south of the States of Alabama and Georgia.

3. That Florida's claim to the natural resources of the seabed seaward of the line of mean low water under the Submerged Lands Act is identical to that described in paragraph 1 above.

4. That, even if the Court finds that the State of Florida, by its 1962 amendment to its 1885 Constitution, relinquished rights it acquired to the natural resources of the seabed adjacent to its coasts, which the State denies, then the State by its 1968 Revised Constitution reacquired those rights.

5. That the present coastline of the State of Florida between the seaward end of the Northern Jetty of Miami Harbor, Miami, Florida, also known as Government Cut, and Cape Romano is determined by the application of a system of straight baselines as defined in the Convention on the Territorial Sea and the Contiguous Zone as follows:

Beginning at the seaward end of the Northern Jetty of Miami Harbor, Miami, Florida, also known as

Government Cut, said point being the Point of beginning of a base line; thence running on a direct line southeasterly to Fowey Rocks, thence in a southwesterly direction through Brewster Reef, Ledbury Reef, Star Reef, Triumph Reef, Long Reef, Ajax Reef, Pacific Reef, Turtle Reef, Carysfort Reef, The Ecbow, French Reef, Molasses Reef, Pickles Reef, Conch Reef, Little Conch Reef, Davis Reef, Crocker Reef, Alligator Reef, to the Tennessee Reef Light better described on Coast and Geodetic Survey Chart No. 1250 as FL. 4 Sec. 49 ft. 12M, thence continue in a southwesterly direction through Sombrero Key, Looe Key, American Shoal, Maryland Shoal, Pelican Shoal, Eastern Sambo, Western Sambo, Eastern Dry Rocks, and Sand Key to the Western Dry Rock, thence in a northwesterly direction through Vestal Shoal, Coalbin Rock, to Cosgrove Shoal; thence in a direct line to an unnamed rock, lying 231° from the Lighthouse at Loggerhead Key at a distance of 4,224 feet more or less, thence in a northeasterly direction to Texas Rock, thence in a direct line northeasterly to the southernmost point of Cape Romano, said point being the ending of aforesaid base line for the State of Florida.

6. That the coastline of the State of Florida in 1868 between the location of the Northern Jetty of Miami Harbor, Miami, Florida, and Cape Romano is to be determined on the basis of a system of straight baselines similar to that described in the above paragraph according to the facts as they existed in 1868.

7. That Florida Bay is an historic or juridical bay and thus inland waters of the State of Florida.

8. That Florida Bay is within Florida's historic boundary as described in Florida's Constitution of 1868.

9. That the waters of the Gulf of Mexico extend seaward in excess of three leagues from the line described in

paragraph 5, *supra*, south of the latitude of the point of beginning of that line.

Respectfully submitted.

ERWIN N. GRISWOLD
Solicitor General of the United States

ROBERT L. SHEVIN
Attorney General of Florida

by: HERBERT T. SCHWARTZ
Deputy Attorney General

September 1971

[Exhibit A, which was attached to the foregoing joint prehearing statement, consisting of Coast and Geodetic Survey Charts C. & G. S. 1242, 1243, 1248 and 1249. They are reproduced later in this appendix.]

SUBMERGED LANDS ACT OF 1953
Public Law 31, CHAPTER 65

AN ACT

To confirm and establish the titles of the States to lands beneath navigable waters within State boundaries and to the natural resources within such lands and waters, to provide for the use and control of said lands and resources, and to confirm the jurisdiction and control of the United States over the natural resources of the seabed of the Continental Shelf seaward of State boundaries.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Submerged Lands Act".

TITLE I

DEFINITION

SEC. 2. When used in this Act—

(a) The term "lands beneath navigable waters" means—

(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and

(3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;

(b) The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 4 hereof but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico;

(c) The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters;

(d) The terms "grantees" and "lessees" include (without limiting the generality thereof) all political subdivisions, municipalities, public and private corporations, and other persons holding grants or leases from a State, or from its predecessor sovereign if legally validated, to lands beneath navigable waters if such grants or leases were issued in accordance with the constitution, statutes, and decisions of the courts of the State in which such lands are situated, or of its predecessor sovereign: *Provided, however*, That nothing herein shall be construed as conferring upon said grantees or lessees any greater rights or interests other than are described herein and in their respective grants from the State, or its predecessor sovereign;

(e) The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power;

(f) The term "lands beneath navigable waters" does not include the beds of streams in lands now or heretofore constituting a part of the public lands of the United States if such streams were not meandered in connection with the public survey of such lands under the laws of the United States and

if the title to the beds of such streams was lawfully patented or conveyed by the United States or any State to any person;

(g) The term "State" means any State of the Union;

(h) The term "person" includes, in addition to a natural person, an association, a State, a political subdivision of a State, or a private, public, or municipal corporation.

TITLE II

LANDS BENEATH NAVIGABLE WATERS WITHIN STATE BOUNDARIES

SEC. 3. RIGHTS OF THE STATES.—

(a) It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

(b) (1) The United States hereby releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources; (2) the United States hereby releases and relinquishes all claims of the United States, if any it has, for money or damages arising out of any operations of said States or persons pursuant to State authority upon or within said lands and navigable waters; and (3) the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States shall pay to the respective States or their grantees issuing leases covering such lands or natural re-

sources all moneys paid thereunder to the Secretary of the Interior or to the Secretary of the Navy or to the Treasurer of the United States and subject to the control of any of them or to the control of the United States on the effective date of this Act, except that portion of such moneys which (1) is required to be returned to a lessee; or (2) is deductible as provided by stipulation or agreement between the United States and any of said States;

(c) The rights, powers, and titles hereby recognized, confirmed, established, and vested in and assigned to the respective States and their grantees are subject to each lease executed by a State, or its grantee, which was in force and effect on June 5, 1950, in accordance with its terms and provisions and the laws of the State issuing, or whose grantee issued, such lease, and such rights, powers, and titles are further subject to the rights herein now granted to any person holding any such lease to continue to maintain the lease, and to conduct operations thereunder, in accordance with its provisions, for the full term thereof, and any extensions, renewals, or replacements authorized therein, or heretofore authorized by the laws of the State issuing, or whose grantee issued such lease: *Provided, however,* That, if oil or gas was not being produced from such lease on and before December 11, 1950, or if the primary term of such lease has expired since December 11, 1950, then for a term from the effective date hereof equal to the term remaining unexpired on December 11, 1950, under the provisions of such lease or any extensions, renewals, or replacements authorized therein, or heretofore authorized by the laws of the State issuing, or whose grantee issued, such lease: *Provided, however,* That within ninety days from the effective date hereof (i) the lessee shall pay to the State or its grantee issuing such lease all rents, royalties, and other sums payable between June 5, 1950, and the effective date hereof, under such lease and the laws of the State issuing or whose grantee issued such lease, except such rents, royalties, and other sums as have been paid to the State, its grantee, the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States and not

refunded to the lessee; and (ii) the lessee shall file with the Secretary of the Interior or the Secretary of the Navy and with the State issuing or whose grantee issued such lease, instruments consenting to the payment by the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States to the State or its grantee issuing the lease, of all rents, royalties, and other payments under the control of the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States or the United States which have been paid, under the lease, except such rentals, royalties, and other payments as have also been paid by the lessee to the State or its grantee;

(d) Nothing in this Act shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power;

(e) Nothing in this Act shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian, relating to the ownership and control of ground and surface waters; and the control, appropriation, use, and distribution of such waters shall continue to be in accordance with the laws of such States.

SEC. 4. SEAWARD BOUNDARIES.—The seaward boundary of each original coastal State is hereby approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or here-

after asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is hereby approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress.

SEC. 5. EXCEPTIONS FROM OPERATION OF SECTION 3 OF THIS ACT.—There is excepted from the operation of section 3 of this Act—

(a) all tracts or parcels of land together with all accretions thereto, resources therein, or improvements thereon, title to which has been lawfully and expressly acquired by the United States from any State or from any person in whom title had vested under the law of the State or of the United States, and all lands which the United States lawfully holds under the law of the State; all lands expressly retained by or ceded to the United States when the State entered the Union (otherwise than by a general retention or cession of lands underlying the marginal sea); all lands acquired by the United States by eminent domain proceedings, purchase, cession, gift, or otherwise in a proprietary capacity; all lands filled in, built up, or otherwise reclaimed by the United States for its own use; and any rights the United States has in lands presently and actually occupied by the United States under claim of right;

(b) such lands beneath navigable waters held, or any interest in which is held by the United States for the benefit of any tribe, band, or group of Indians or for individual Indians; and

(c) all structures and improvements constructed by the United States in the exercise of its navigational servitude.

SEC. 6 POWERS RETAINED BY THE UNITED STATES.—(a) The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 3 of this Act.

(b) In time of war or when necessary for national defense, and the Congress or the President shall so prescribe, the United States shall have the right of first refusal to purchase at the prevailing market price, all or any portion of the said natural resources, or to acquire and use any portion of said lands by proceeding in accordance with due process of law and paying just compensation therefor.

SEC. 7. Nothing in this Act shall be deemed to amend, modify, or repeal the Acts of July 26, 1866 (14 Stat. 251), July 9, 1870 (16 Stat. 217), March 3, 1877 (19 Stat. 377), June 17, 1902 (32 Stat. 388), and December 22, 1944 (58 Stat. 887), and Acts amendatory thereof or supplementary thereto.

SEC. 8. Nothing contained in this Act shall affect such rights, if any, as may have been acquired under any law of the United States by any person in lands subject to this Act and such rights, if any, shall be governed by the law in effect at the time they may have been acquired: *Provided, however,* That nothing contained in this Act is intended or shall be construed as a finding, interpretation, or construction by the Congress that the law under which such rights may be claimed in fact or in law applies to the lands subject to this Act, or authorizes or compels the granting of such rights in such lands, and that the determination of the applicability or effect

of such law shall be unaffected by anything contained in this Act.

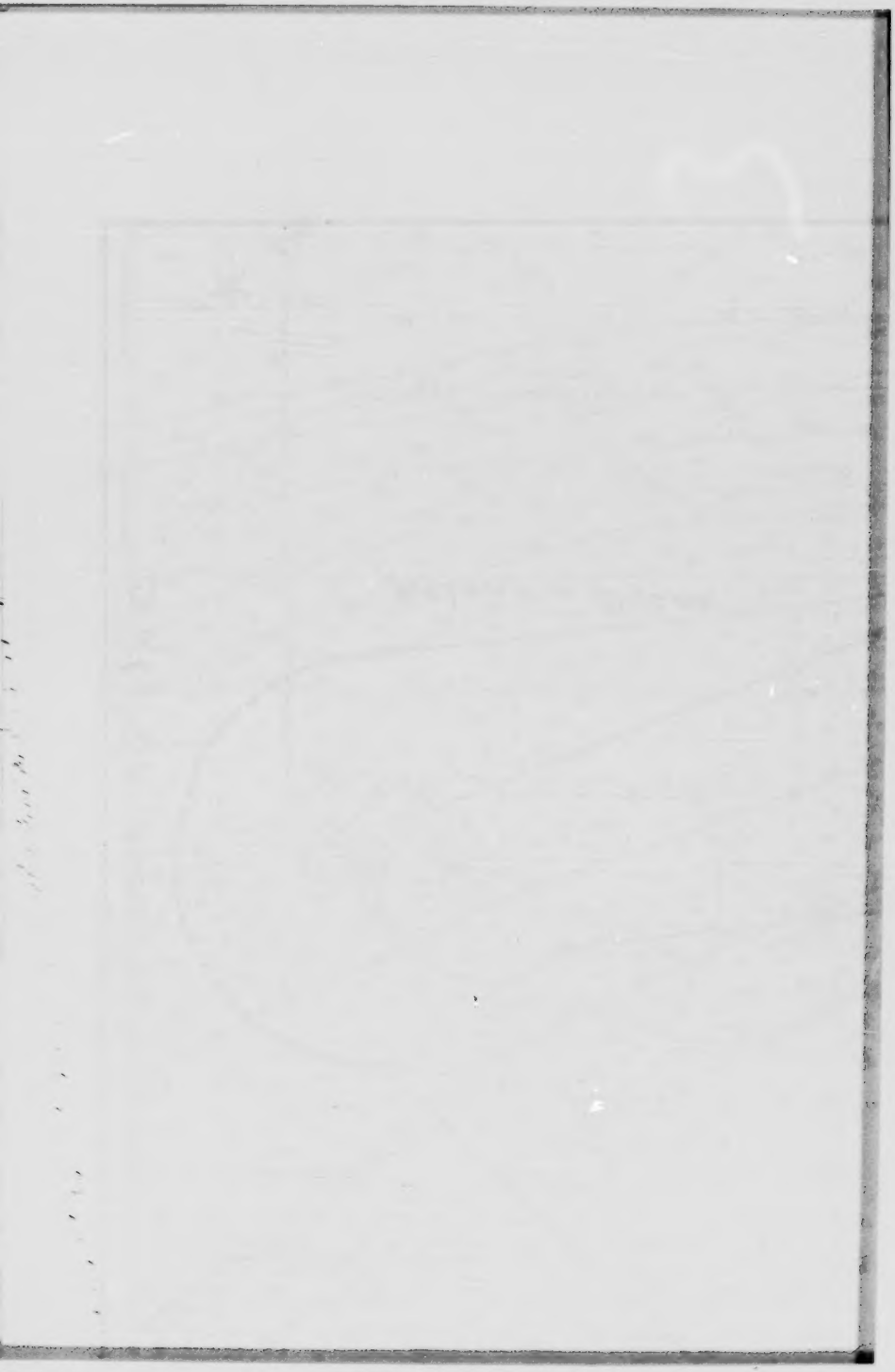
SEC. 9. Nothing in this Act shall be deemed to affect in any wise the rights of the United States to the natural resources of that portion of the subsoil and seabed of the Continental Shelf lying seaward and outside of the area of lands beneath navigable waters, as defined in section 2 hereof, all of which natural resources appertain to the United States, and the jurisdiction and control of which by the United States is hereby confirmed.

SEC. 10. Executive Order Numbered 10426, dated January 16, 1953, entitled "Setting Aside Submerged Lands of the Continental Shelf as a Naval Petroleum Reserve", is hereby revoked insofar as it applies to any lands beneath navigable waters as defined in section 2 hereof.

SEC. 11. SEPARABILITY.--If any provision of this Act, or any section, subsection, sentence, clause, phrase or individual word, or the application thereof to any person or circumstance is held invalid, the validity of the remainder of the Act and of the application of any such provision, section, subsection, sentence, clause, phrase or individual word to other persons and circumstances shall not be affected thereby; without limiting the generality of the foregoing, if subsection 3 (a) 1, 3 (a) 2, 3 (b) 1, 3 (b) 2, 3 (b) 3, or 3 (c) or any provision of any of those subsections is held invalid, such subsection or provision shall be held separable and the remaining subsections and provisions shall not be affected thereby.

Approved May 22, 1953.

Section of C. & G. S. 1113 ⟶



OUTS ARE TOO LARGE TO BE FILMED

IN THE

Supreme Court of the United States

FILED
DEC 20 1971
E. ROBERT SEAVER, CLERK

October Term, 1971 No. 52, Original

UNITED STATES OF AMERICA,
Plaintiff

v.

STATE OF FLORIDA,
Defendant

REPORT OF THE SPECIAL MASTER UPON THE MOTION BY THE UNITED STATES TO DISMISS THE COUNTERCLAIM AND DENY THE DEMAND FOR JURY TRIAL FILED BY THE STATE OF FLORIDA

November 30, 1971

ALBERT B. MARIS
Special Master

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107

IN THE

Supreme Court of the United States

October Term, 1971 — No. 52, Original

UNITED STATES OF AMERICA,
Plaintiff

v.

STATE OF FLORIDA,
Defendant

REPORT OF THE SPECIAL MASTER UPON THE MOTION BY THE UNITED STATES TO DISMISS THE COUNTERCLAIM AND DENY THE DEMAND FOR JURY TRIAL FILED BY THE STATE OF FLORIDA

TO THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Pursuant to the order of the Court entered June 28, 1971, 403 U.S. 949, your special master submits the following report with respect to the motion filed by the United States to dismiss the counterclaim and deny the demand for a jury trial filed by the State of Florida, which motion was referred to me by that order.

The complaint, which was filed by the United States in No. 35, Original, against the States of Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia and Florida alleged that the United States is entitled, to the exclusion of the defendant States, to exercise sovereign rights over the seabed and subsoil underlying the Atlantic Ocean, including the Straits of Florida, lying more than three geographical miles from the ordinary low water mark or from the outer limit of inland waters on the coast (within which coastal area the United States had transferred its rights to the States by the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. §§1301 et seq.) seaward to the limits of the Continental Shelf for the purpose of exploring the area and exploiting its natural resources. The complaint asserted that the defendant States, including the State of Florida, claim rights in the seabed and subsoil of the Continental Shelf beyond the outer limits of the areas granted them by the Submerged Lands Act. A separate cause of action was asserted against each defendant State and a declaratory decree and order for accounting were sought.

The State of Florida filed an answer and on February 4, 1971 an amended answer. The latter contains a counterclaim for damages and a demand for a jury trial on the counterclaim. By its amended answer Florida denies the claim of the United States to rights in the seabed and subsoil of the Continental Shelf and sets up two affirmative defenses, one to a portion of the claim of the United States and the other to the whole of it. The first is that the Straits of Florida are an arm of the Gulf of Mexico, that the Florida Keys are in the Gulf of Mexico, and that Florida is entitled to a southern seaward boundary of three marine leagues from its coastline wherever located in this area. Florida's other and principal affirmative defense is that by the Act of June 25, 1868, 15 Stat. 73, Congress approved the marine boundaries of the State and granted to Florida whatever interest the United States possessed in the maritime terri-

tory within those boundaries, which boundaries, Florida asserts, run more than three geographical miles seaward from its coast in part of the Atlantic Ocean.

By the counterclaim which it included in its amended answer, Florida repeats its averments that Congress by the Act of 1868 granted to the State the submerged lands within the marine boundaries specified in its constitution and thereby vested title to at least 509,224 acres of submerged lands in the Atlantic Ocean. The counterclaim then asserts that "By now denying said title of the State of Florida, the United States of America is seeking to take said property without just compensation" and it asks for damages from the United States in excess of $51,000,000 and demands a trial by jury on the claim.

Thereafter, the United States filed a motion to dismiss the counterclaim on the ground that it represents a suit against the United States to which it has not consented and that, in any event, it fails to state a claim for which relief can be granted. The motion also seeks denial of the demand for jury trial on the ground that Florida is not a "citizen" and its counterclaim is not an "action at law" within the meaning of 28 U.S.C. §1872. In its memorandum filed in opposition to the motion to dismiss the counterclaim, Florida seeks to broaden the basis for its counterclaim by asserting that the United States "seemingly contends that the Submerged Lands Act limits" to three geographic miles the larger area of seabed in the Atlantic Ocean which allegedly had been granted to it by the Act of 1868, and that the subsequent enactment of the Submerged Lands Act, therefore, constituted a taking of its property for which it is entitled to just compensation.

On joint motion of the United States and the State of Florida and upon the report of your special master the Court by the orders of June 28, 1971, 403 U.S. 949, 950, severed the cause of action asserted by the United States against the State of Florida from its causes of action against the other twelve Atlantic seaboard States in No. 35, Original, for all purposes and consolidated that cause of action

with the remaining proceedings with respect to the State of Florida in the case of United States v. Louisiana, Texas, Mississippi, Alabama and Florida, No. 9, Original, the severed and consolidated case to be known as United States of America v. State of Florida, No. 52, Original.

The motion of the United States came on for hearing before me on October 22, 1971. In a reply memorandum filed for the United States, the Solicitor General asserts that "we have never contended that the Submerged Lands Act took anything away from any State. The Act was a grant, not a taking. If, contrary to our belief, Florida had seabed rights beyond three miles before the Act, the Act did not diminish them, and they presumably will be recognized by the judgment in this case." At the hearing counsel for the United States stated that the United States adhered to that view and would, in this case, continue to adhere to it. In view of the position of the United States as thus stated, counsel for the State of Florida conceded that the counterclaim filed by that State was without legal basis and that it might, therefore, be dismissed. Counsel also stated that Florida did not desire to press its demand for a jury trial, which demand falls, in any event, with the dismissal of the counterclaim to which it was directed.

Your special master accordingly recommends that an order be entered dismissing the counterclaim of the State of Florida filed February 4, 1971 and denying the demand of the State of Florida for a trial thereof by jury.

Respectfully submitted,

ALBERT B. MARIS
Special Master

November 30, 1971

INDEX

	Page
Exceptions	1
Statement	2
Argument:	
I. Florida Bay is not a juridical bay	7
II. Island Archipelagos may not be enclosed by closing lines	15
Conclusion	19

CITATIONS

Cases:	
Louisiana Boundary Case, 394 U.S. 11	10, 11, 12, 14, 18
Manchester v. *Massachusetts*, 139 U.S. 240	14
United States v. *California*, 332 U.S. 19 (*California I*)	2
United States v. *California*, 381 U.S. 139 (*California II*)	9, 13–14, 18
United States v. *Florida*, 363 U.S. 121	2, 3, 15
United States v. *Louisiana*, 339 U.S. 699 (*Louisiana I*)	2
United States v. *Louisiana*, 363 U.S. 1 (*Louisiana II*)	2
United States v. *Louisiana*, 389 U.S. 155 (*Louisiana III*)	14
United States v. *Texas*, 339 U.S. 707	2

537-871—74——1

Treaty and statute:
Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. (Part 2) 1606 .. 8, 9
Article 4 ..... 16, 17
Article 4(3) 17
Article 7 ..... 9, 10, 13, 14
Articles 14–23 8
Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1301 *et seq.* 2
Section 1301(b) 9, 15
Section 1031(c) 5, 9
Miscellaneous:
4 Whiteman, *Digest of International Law* (1965) 8, 19

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 52, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF FLORIDA

EXCEPTIONS OF THE UNITED STATES TO THE REPORT OF THE SPECIAL MASTER FILED FEBRUARY 19, 1974, AND BRIEF IN SUPPORT OF EXCEPTIONS

EXCEPTIONS

The United States takes exception to two determinations by the Special Master that certain waters previously treated by the United States in the conduct of its foreign affairs as territorial seas or international waters are instead inland waters within the coastline of the State of Florida:

1. The United States excepts to the Special Master's conclusion (Report, p. 57) that "[t]he waters between the mainland and the upper Florida Keys which lie east of a straight line drawn between the East Cape of Cape Sable and Knight Key * * * constitute inland waters of the State of Florida," and to the findings on which that conclusion is based.

2. The United States further excepts to the Special Master's finding (Report, pp. 52–53) that the narrow waters within each of three groups of islands—the lower Florida Keys from Money Key to Key West, the Marquesas Keys, and the Dry Tortugas Islands—are inland waters of the State of Florida.

STATEMENT

This case involves the rights of the State of Florida in the sea and seabed adjacent to its coasts. It is a continuation of the tidelands litigation falling within the original jurisdiction of this Court; a brief review of that litigation may therefore be helpful.

In *United States* v. *California,* 332 U.S. 19 (*California I*), this Court held that the United States, and not the several States, has full dominion over the resources of the seabed of the territorial sea. This principle was reaffirmed by the Court in *United States* v. *Louisiana,* 339 U.S. 699 (*Louisiana I*), and *United States* v. *Texas,* 339 U.S. 707.

Shortly thereafter, Congress enacted the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1301 *et seq.*, granting all coastal States ownership of the resources of the seabed within three geographical miles of their coasts, and further granting the coastal States along the Gulf of Mexico such ownership within their historic offshore boundaries, if any, out to a maximum of three marine leagues in the Gulf. It was then determined, in *United States* v. *Louisiana,* 363 U.S. 1 (*Louisiana II*), and *United States* v. *Florida,* 363 U.S. 121, that Texas and Florida, but not the other Gulf coastal States, possessed historic offshore boundaries extending more

than three geographical miles into the Gulf. The cause (No. 10, Original, subsequently renumbered as No. 9, Original) was retained "to determine the coastline, fix the boundary and dispose of all other relevant matters." *United States* v. *Florida, supra,* 363 U.S. at 129. The particular issues remaining between Florida and the United States were the location of the line dividing the Atlantic Ocean from the Gulf of Mexico, the determination of Florida's coastline, and the fixing of its historic boundary in the Gulf.

Subsequently, the United States instituted a new proceeding (No. 35, Original) against all thirteen Atlantic coast States, including Florida, to determine the respective rights of the United States and those States to the resources of the seabed adjacent to them in the Atlantic Ocean. Florida's claims in that proceeding were different from those of the other Atlantic coast States, and it moved that the case against it be severed.

At this point, the United States and Florida jointly moved for consolidation of the issues between them, involving both the Gulf of Mexico and the Atlantic Ocean, into a single, separate proceeding. This Court granted the joint motions, ordered Florida severed from the other States in No. 9, Original and No. 35, Original, consolidated the Florida proceedings into this action (No. 52, Original), and appointed a Special Master. 403 U.S. 949, 950.

Several interrelated issues were before the Special Master:

(1) Florida's principal contention was that congressional approval of its 1868 constitution constituted an express or implied grant of all natural resources of the seabed within its historic offshore boundary in both the Atlantic Ocean and the Gulf of Mexico, and that the State is therefore entitled to those resources without regard to the three-mile and three-league limits of the Submerged Lands Act. The Special Master rejected that contention and determined (Report, pp. 8–11, 56) that the State is entitled only to the rights specifically granted by the Act.

(2) The parties disagreed as to the location of the line dividing the Atlantic Ocean from the Gulf of Mexico, and the Special Master determined (Report, pp. 18–21, 56) the location of that line in the manner contended for by the United States.

(3) The parties disagreed as to the location of that segment of the State's historic boundary in the Gulf of Mexico running northeastwardly from the Dry Tortugas Islands toward the mainland. Florida contended that the boundary was marked by a straight line running due northeast from the Dry Tortugas, encompassing "a very large roughly semicircular area of comparatively deep water" (Report, p. 26); the United States contended that the boundary followed along connected segments of straight lines, five-fathom curves, and three-fathom curves, running generally northeastwardly in shallow waters within three marine leagues of the coastline of the outlying islands. The respective contentions are set forth on the chart op-

posite page 84 of the Report. The Special Master rejected both contentions and fixed (Report, pp. 24–31) the historic boundary as running along a line three marine leagues seaward of the coastline.

(4) Florida contended that the waters generally circumscribed by the mainland, the islands running out from the mainland all the way to the Dry Tortugas, and a line running due northeast from the Dry Tortugas back to the mainland, constituted an historic bay which comprised inland waters of the State. The United States contended that none of that area of water satisfied the requirements of an historic bay. The Special Master rejected Florida's broad contention but nevertheless determined (Report, pp. 36–47, 57) that the portion of that area lying east of a straight line drawn between Knight Key and East Cape (see the chart opposite page 84 of the Report) constitutes a juridical bay, which he denominated "Florida Bay," and that the waters within that bay are inland waters of the State.

(5) Under the Submerged Lands Act, the coastline of a State is defined as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." 43 U.S.C. 1301(c). The Special Master's determination that the waters of Florida Bay are inland waters required his further determination (Report, pp. 47–55) that the coastline surrounds the Bay by means of closing lines running southwestwardly from the mainland through the

upper Florida Keys to Knight Key, and across the mouth of the Bay from Knight Key to East Cape. The coastline was not otherwise in dispute between the parties, who understood that it would be defined elsewhere by natural shorelines. But the Special Master determined *sua sponte* that as to each of three groups of outlying islands—the lower Florida Keys from Money Key to Key West, the Marquesas Keys, and the Dry Tortugas—"the narrow waters within the group are inland waters of the State of Florida and the coastline follows the ordinary low-water line along those portions of the coast of the outer islands and low-tide elevations of the group which are in direct contact with the open sea and straight lines drawn between those islands and low-tide elevations" (Report, pp. 52–53).

(6) The Special Master concluded (Report, pp. 57–59) that Florida is entitled, as against the United States, to the seabed and all the natural resources of the seabed and the sea within three geographical miles of its coastline in the Atlantic Ocean and three marine leagues of its coastline in the Gulf of Mexico, and that the United States is entitled, as against Florida, to the seabed and all the natural resources of the seabed and sea of the outlying continental shelf.

The United States excepts only to the Special Master's determinations that the Florida Bay and the narrow waters of the three groups of outlying islands constitute inland waters of the State.

ARGUMENT

I

FLORIDA BAY IS NOT A JURIDICAL BAY

1. The determination whether Florida Bay is a juridical bay constituting inland waters of the State of Florida has little importance to the final determination of the respective seabed rights of the United States and the State under the Submerged Lands Act. Measuring the State's historic boundary from the Bay's closing lines as designated by the Special Master, rather than from the natural shorelines of the mainland and upper Florida Keys, affects little more than ten square miles of seabed in an area having no known mineral resources.[1] But the juridical status of the Bay has a larger international significance which is unrelated to the Act.

In the conduct of its foreign affairs, the United States treats the waters of Florida Bay as territorial seas or international waters. The United States presently claims a three-mile territorial sea, measured from the mainland islands, and certain low-tide elevations along the Bay. The extent of that claim is shown on the chart opposite page 94 of the Report.

[1] Moreover, even if the existence of a juridical bay is assumed the Special Master erred in measuring the historic boundary from the present closing line; the historic rather than present closing line should have been used for that purpose; and the historic closing line, if any, was too far east to affect the historic boundary. See pp. 14–15, *infra*.

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Similar maps have in the past been distributed to foreign governments in order to indicate to them the extent of our territorial sea (Report, p. 42). Approval of the Special Master's determination of the existence of a juridical bay would extend the United States' claim into waters previously treated as high seas, and it would imply adoption by the United States of a principle permitting one side of a bay to be formed by a chain of islands. These results would be contrary to the foreign policy of the United States, which has consistently been to discourage coastal states from extending their jurisdiction into areas previously regarded as high seas. See, *e.g.*, 4 Whiteman, *Digest of International Law* 88–91 (1965).

The 24-mile closing line proposed by the Special Master would enclose waters through which foreign vessels have historically possessed the right of innocent passage. The determination that those waters are inland waters, subject to the exclusive dominion of the coastal nation, cuts off that right.[2] Foreign vessels passing through the keys east of Knight Key would henceforth do so only at the sufferance of the coastal State. Although the shallow waters in the Bay are not readily navigable by large ships, smaller vessels would be affected, and a precedent would be set which other nations might use to shut off passage through island chains near their coasts. Also, by extending both the territorial sea and the nine-mile

[2] For an enumeration of the rights possessed within the territorial sea, see Articles 14–23 of the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. (Part 2) 1606.

contiguous zone into areas previously considered high seas, the Special Master's determination would sharply curtail the rights of foreign vessels: foreign vessels, which had previously operated in those seas without any interference by the United States, would become subject to American customs, immigration, pollution, and fisheries laws and, within the extended areas of territorial sea, would be deprived of all high seas rights.

In short, the Special Master's determination threatens many international maritime rights in both the Bay and the outlying waters.

2. The Act grants seabed rights extending "from the coast line" of the coastal State, and, as we have previously indicated, "coast line" is defined as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." 43 U.S.C. 1301(b), (c). This Court, in *United States* v. *California* (*California II*), 381 U.S. 139, further determined that the meaning of "inland waters," as used in the Act, conforms to its meaning in the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. (Part 2) 1606. And the parties here stipulated that the determination of the Florida coastline "shall be governed by pertinent articles of the Convention * * *" (Report, p. 69).

Article 7 of the Convention, which is set forth at pages 37–38 of the Report, describes a juridical bay as a "well-marked indentation" containing "landlocked waters." We believe that the Special Master erred in

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determining that Florida Bay is a juridical bay within the meaning of that Article.[3]

In the *Louisiana Boundary Case*, 394 U.S. 11, this Court distinguished between Article 7 bays, which are formed by indentations in a mainland coast, and bodies of water lying between the mainland and fringes or chains of islands lying off the coast. The Court there expressly sustained the position of the United States that "island chains can be taken into account as enclosing inland waters only by drawing straight baselines [and that] the decision whether to draw such baselines is within the sole discretion of the Federal Government." 394 U.S. at 67. The Court "concluded that Article 7 does not encompass bays formed in part by islands which cannot realistically be considered part of the mainland." *Ibid.* Accordingly, a body of water bounded on one side by the mainland and on the other side by a chain of islands, and not formed by any substantial indentation in the mainland, cannot be a juridical bay under Article 7 unless the islands are "so closely aligned with the mainland as to be deemed a part of it." 394 U.S. at 67, n. 88.

[3] Moreover, even if the Special Master was correct in determining the existence of a juridical bay, he erred in drawing the closing line between Knight Key and the East Cape of Cape Sable. That line has a distance of 24.55 geographic miles and therefore exceeds the maximum closing line of twenty-four miles permitted by Article 7. See *Louisiana Boundary Case*, 394 U.S. 11, 48–50, n. 64. However, if the finding of a juridical bay is sustained, a closing line of proper length could be drawn from East Cape to Vaca Key.

Florida Bay does not meet the tests set forth in the *Louisiana Boundary Case*. The Bay is not formed by any substantial indentation in the mainland; it is simply a body of water lying between the mainland and the upper Florida Keys. And the upper Florida Keys cannot realistically be considered part of the mainland. There are substantial water barriers between several of the keys: gaps of approximately one mile or more separate Teatable Key from Indian Key, Lower Matecumbe Key from Greyhound Key, and Long Key from the Conch Keys. See the chart opposite page 94 of the Report. Moreover, there are at least two navigation channels—between Teatable and Indian Keys, and Lower Matecumbe and Greyhound Keys—through the upper Florida Keys. *Ibid.;* and see the the chart opposite page 84 of the Report. It is the view of the United States that the channels and water gaps west of Teatable Key preclude any finding that the keys further west are "so closely aligned with the mainland as to be deemed a part of it." Certainly there is no basis for such a finding with respect to the outermost of the upper Keys, Knight Key, which is separated from the mainland by several water gaps and channels.

The Special Master did, however, make a general finding to that effect. His reasoning is not set forth in detail in his Report, but he apparently relied (Report, p. 39) on an earlier portion of the *Louisiana Boundary Case* opinion (394 U.S. at 60-66) which dealt with the circumstances in which islands may be treated as headlands of bays. That discussion, how-

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ever, concerned only bays which are formed by substantial indentations into the mainland coast but additionally have a "natural entrance point" or headland located on an island.[4] That discussion, of course, does not apply to cases, such as this, where there is no substantial indentation in the mainland coast. The question here is not whether the headland of a bay may be located on an island, but rather whether a juridical bay may be formed by a fringe of islands projecting out from a generally flat or convex mainland. The answer given to that legal question by this Court in the past—that a juridical bay may be so formed only when the islands may realistically be deemed part of the mainland—requires reversal of the Special Master's determination here.

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[4] Even in discussing the use of islands merely as headlands, the Court recognized that islands could only rarely be treated as forming any portion of the coast of a juridical bay (394 U.S. at 62–63): "Of course, the general understanding has been—and under the Convention certainly remains—that bays are indentations in the *mainland*, and that islands off the shore are not headlands but at the most create multiple mouths to the bay. In most instances and on most coasts it is no doubt true that islands would play only that restricted role in the delimitation of bays. But much of the Louisiana coast does not fit the usual mold. It is marshy, insubstantial, riddled with canals and other waterways, and in places consists of numerous small clumps of land which are entirely surrounded by water and therefore technically islands." (Emphasis in original; footnotes omitted.)

Thus the Court there permitted the use of islands as headlands only because of the peculiar nature of the Louisiana coast, where islands and mainland are to a large degree indistinguishable as a practical matter. The Special Master gave no similar reasons to justify his far more extensive use of islands as the major defining coastline of a juridical bay.

3. After concluding that Florida Bay is a juridical bay, the Special Master further observed that "the character of this area as inland waters of the State of Florida appears to be conceded by the United States" (Report, p. 39). The United States intended no such concession and believes that it made none. Florida's principal claim with respect to those waters had been that they were a portion of a larger historic bay,[5] and the United States argued extensively in its post-trial brief (pp. 78–109) that there are no historic bays along the coast of Florida. We did not argue the question of juridical bays in that brief, for Florida at trial had seemingly abandoned its original alternative claim of an Article 7 juridical bay. But we had presented evidence at trial which was intended to refute that alternative claim. See Tr. 145–146.

Moreover, our position with respect to the necessary defining characteristics of a juridical bay has been consistently maintained throughout the tidelands litigation in this Court. A bay formed between the mainland coast and a fringe of islands projecting away from that coast can be designated a juridical bay under Article 7 only if either (a) the United States has determined to connect the islands with the mainland by means of straight baselines or (b) the islands are, as a practical matter, largely indistinguishable from the mainland. See *California II, supra*, 381 U.S.

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[5] Such bays have been described by this Court as "bays over which a coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations." *California II, supra*, 381 U.S. at 172.

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at 167–172; *Louisiana Boundary Case, supra,* 394 U.S. at 66–73.

4. But even if it is assumed *arguendo* that Florida Bay satisfies the Article 7 definition of a juridical bay, the Special Master erred in measuring Florida's historic offshore boundary from the 24-mile closing line which he designated for the Bay. Historic boundaries measured from the coastline must be measured from the historic coastline. *United States* v. *Louisiana,* 389 U.S. 155 (*Louisiana III*). At the time Florida's 1868 constitution was adopted, the United States recognized closing lines of no more than two marine leagues. See *Manchester* v. *Massachusetts,* 139 U.S. 240, 258. After a comprehensive review of the history of the subject, the Special Master in the *California II* case concluded that even as late as 1947 "the United States had taken the position that a bay was inland water only if a closing line could be drawn across its mouth less than 10 miles long * * *." 381 U.S. at 163. The longer 24-mile closing line is a creature of the Convention on the Territorial Sea and the Contiguous Zone and was adopted by the United States only upon its ratification of the Convention on March 24, 1961.

Thus even if, contrary to our contention, a juridical bay can be formed out of the upper Florida Keys, its maximum closing line for the purpose of fixing Florida's historic boundary would be two marine leagues in length. Such a closing line would, of course, be considerably to the east of the closing line drawn by the Special Master. Indeed, such a closing line, or even a longer closing line ten miles in length, would

be east of many of the small islands in the Bay and therefore would not affect Florida's historic boundary at all; that boundary would be measured three leagues out from the natural shorelines of those islands rather than from the closing line. Moreover, since the boundary so drawn would at all points lie at least three geographical miles beyond the 24-mile closing line designated by the Special Master, that longer closing line would not be in any way relevant to a determination of Florida's seabed rights under the Submerged Lands Act.[6] In other words, the question whether Florida Bay constitutes a juridical bay should have no bearing on the ultimate disposition of the seabed rights at issue in this case although, for the reasons previously stated (pp. 7–9, *supra*), the question is important because of its international ramifications.

II

ISLAND ARCHIPELAGOS MAY NOT BE ENCLOSED BY CLOSING LINES

1. The Special Master *sua sponte* used closing lines to enclose the narrow waters of each of three island groups—the lower Florida Keys from Money Key to

[6] Florida is granted seabed rights within its historic boundary in the Gulf out to a maximum of three leagues, but is guaranteed a minimum of three miles from its current coastline. 43 U.S.C. 1301(b); *United States* v. *Florida*, *supra*. Where the historic boundary lies more than three miles seaward of the current coastline, the three mile minimum alternative need not be invoked.

Key West, the Marquesas Keys, and the Dry Tortugas Islands. The use of such closing lines has little or no effect on the disposition of seabed rights in this case; there is no substantial difference between Florida's seabed rights as determined by the Special Master, using closing lines as the coastline, and those which would be determined using natural shorelines. However, as in the case of the Special Master's enclosure of Florida Bay, the enclosure of the waters within each of the three outer island groups has such important international ramifications that the United States is constrained to except to the Special Master's finding.

The United States has heretofore treated the narrow waters within these three island groups as territorial seas through which foreign vessels may engage in innocent passage without restriction or interference. By encircling each island group with closing lines, the Special Master converted these territorial seas into inland waters, thus terminating the right of innocent passage. This of course threatens direct interference with foreign navigation and is contrary to the foreign policy position of the United States.

2. The Special Master's finding cannot be justified under the Convention on the Territorial Sea and the Contiguous Zone. Since the narrow waters within these island groups are neither bays nor rivers, their enclosure by use of closing lines would be permitted under the Convention only if they satisfy the requirements for the use of straight baselines. But Article 4 of the Convention allows the use of straight baselines

only "[i]n localities where the coast line is deeply indented and cut into, or if there is a fringe of islands in its immediate vicinity" and specifies that "[t]he drawing of such baselines must not depart to any appreciable extent from the general direction of the coast * * *." See Report, p. 48. The islands here in question—the lower Florida Keys, the Marquesas, and the Dry Tortugas—do not meet these criteria.

Article 4 contemplates the enclosure of inland waters lying between an island chain and the mainland coast, not of waters lying within a group of islands. Moreover, the islands here at issue are not in any event in the immediate vicinity of the mainland; instead, they extend away from the mainland, separating the Atlantic Ocean from the Gulf of Mexico, with the most seaward group, the Dry Tortugas, lying almost 100 miles from the mainland. Furthermore, the closing lines proposed by the Special Master would not follow the general direction of the coast at all; they would completely encircle each of the three island groups without regard to the direction of the mainland coastline.[7]

Moreover, even if these island groups otherwise satisfied the requirements of Article 4, it was not

[7] Finally, whereas Article 4(3) prohibits the construction of straight baselines "to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them" (see Report, p. 48), the Special Master has proposed lines among the "outer islands and low-tide elevations of the group * * *" (Report, p. 53). Nautical charts of these islands show that there are numerous low-tide elevations among them which do not have permanent installations above sea level.

within the jurisdiction of the Special Master to create inland waters through the construction of straight baselines. As in the *Louisiana Boundary Case, supra,* 394 U.S. at 67, "the decision whether to draw such baselines is within the sole discretion of the Federal Government, and the United States has not chosen to do so." And, as this Court further observed in the *Louisiana Boundary Case, supra,* 394 U.S. at 72–73:

> * * * this optional method of establishing boundaries should be left to the branches of Government responsible for the formulation and implementation of foreign policy. It would be inappropriate for this Court to review or overturn the considered decision of the United States * * * not to extend its borders to the furthest extent consonant with international law. [Footnote omitted.]

See, also, *California II, supra,* 381 U.S. at 167–169. The United States has not chosen to construct straight baselines within the island groups at issue, and the Special Master erred in doing so himself.

3. The Special Master's finding, if approved, would embarrass the United States in the conduct of its foreign affairs. The Special Master's use of baselines represents, in a small way, application of an archipelagic principle of enclosure which this nation currently opposes as a violation of international law. Certain island nations, particularly Indonesia and the Philippines, have drawn baselines connecting their outer islands and have claimed the seas thus enclosed as internal or "national" waters; the United States officially opposes such enclosures, because they significantly interfere with our national security and

commercial shipping interests. See Whiteman, *supra,* at 284–285.

The baselines drawn by the Special Master are of course much shorter than those claimed by the major island nations. But the archipelagic principle involved is similar, and its adoption by this Court could prejudice the United States' negotiating position concerning archipelagic regimes in the current Law of the Sea Conference beginning June 20, 1974. Since there are numerous areas around the world with coastal islands where such a principle could be applied by foreign nations, vital navigation and foreign policy interests are at stake.

CONCLUSION

For the foregoing reasons, this Court should determine that the area designated by the Special Master as Florida Bay is not a juridical bay and that the narrow waters within the lower Florida Keys, the Marquesas, and the Dry Tortugas are not enclosed as inland waters by means of straight baselines.

Respectfully submitted.

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APRIL 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974

APR 23 1974

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 52, Original

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF FLORIDA,

Defendant.

BRIEF OF AMICI CURIAE STATES OF DELAWARE, GEORGIA, MAINE, MARYLAND, MASSACHUSETTS, NEW HAMPSHIRE, NEW JERSEY, NEW YORK, NORTH CAROLINA, RHODE ISLAND, SOUTH CAROLINA AND VIRGINIA

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April 24, 1974

Washington, D.C. • CLB PUBLISHERS, INC. • (202) 393-0625

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
INTEREST OF AMICI CURIAE	2
PRIOR AND RELATED PROCEEDINGS	3
1. Institution of Original No. 35 and Severance of Florida Therefrom	3
2. Evidentiary Proceedings in Original No. 35	10
3. Original No. 52: Briefs and Master's Report	16
4. Comments of the Parties in Original No. 35 on the Special Master's Report in Original No. 52	19
ARGUMENT	20

TABLE OF CITATIONS

United States v. California, 332 U.S. 19 (1947)	2,4,5,10,13,14,15,16,17,21,22
United States v. Louisiana, 363 U.S. 1 (1960)	7
United States v. Maine *et al.*, No. 35, Original	2, 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 52, Original

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF FLORIDA,

Defendant.

BRIEF OF AMICI CURIAE STATES OF DELAWARE, GEORGIA, MAINE, MARYLAND, MASSACHUSETTS, NEW HAMPSHIRE, NEW JERSEY, NEW YORK, NORTH CAROLINA, RHODE ISLAND, SOUTH CAROLINA AND VIRGINIA

Amici curiae the States of Delaware, Georgia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Rhode Island, South Carolina and Virginia file this brief, sponsored by their Attorneys General, pursuant to Rule 42(4) of the Rules of this Court.

QUESTION PRESENTED

This case, in which Florida is the defendant, and Original No. 35, in which amici curiae are the defendants,

place in issue for the first time the question of federal versus State ownership of the natural resources of the Atlantic continental shelf, and both cases raise the question whether this Court's decision in *United States v. California* should be applied to the Atlantic Ocean. The underlying historical, factual and legal issues have been fully developed in evidentiary proceedings in Original No. 35, which will probably be before this Court early next Term. Those underlying issues could not be and were not developed in this case, because Florida was expressly precluded from raising them when this case was severed from Original No. 35. The question presented is:

Should not this Court's consideration of this case be postponed for a brief period, so that it may be heard next Term together with Original No. 35, because (1) immediate consideration of this case without the benefit of the Master's report in Original No. 35 would deny the Court the opportunity of first confronting the issues on an adequate record and be inconsistent with this Court's reference of Original No. 35 to a special master; (2) reaffirmation by the Court in this case of the *California* doctrines and application of them to the Atlantic would seriously prejudice the rights and interests of amici curiae; and (3) no party will be injured by a short delay until next Term of the disposition of this case, or at least of the issues herein which overlap Original No. 35?

INTEREST OF AMICI CURIAE

Amici curiae are twelve of the thirteen Atlantic seaboard States. All of them are defendants in *United States v. Maine et al.*, Original No. 35. The aspects of the present case dealing with the Atlantic Ocean were originally a part of Original No. 35, but were severed from it on the theory that Florida's case presented no

issue of law or fact in common with the issues raised by the other twelve Atlantic seaboard States.

As this case proceeded, it developed that, notwithstanding the basis for severance, its disposition necessarily involves the resolution of several critical issues of fact and law which profoundly affect the rights and interests of amici curiae. These issues have been fully developed on an exhaustive evidentiary record in Original No. 35 before the Special Master, whose report in that case is imminent. Amici fear that a disposition of the present case, without the benefit of the record developed in Original No. 35, might result in determinations inconsistent with the historic title which they assert and would therefore be seriously prejudicial to their rights and interests.

PRIOR AND RELATED PROCEEDINGS

1. *Institution of Original No. 35 and Severance of Florida Therefrom*

The Atlantic Ocean issues in this case were formerly part of *United States v. Maine et al.*, Original No. 35, which was instituted in April 1969 by the filing of a Complaint by plaintiff against all thirteen Atlantic coastal States, *i.e.*, amici curiae and Florida. The issue raised by the Complaint was, and is, whether it is the United States or the defendant States which possess the exclusive right to explore and to exploit the natural resources of the seabed and subsoil underlying the Atlantic Ocean, extending seaward more than three miles from the ordinary low-water mark and from the outer limit of inland waters on the coast to the outer edge of the continental shelf. The Complaint sought to establish that exclusive right on behalf of the United States and to defeat any conflicting

"right, title or interest" claimed by the States. On June 16, 1969, this Court granted plaintiff's motion for leave to file the Complaint.

The Answers of the States varied in language, but generally claimed "some interest" in the area in question, denied plaintiff's claimed exclusive right, and asserted exclusive rights to explore and to exploit on behalf of themselves. See, *e.g.*, Answer of the State of Maine. Each of the twelve defendant States other than Florida alleged that it is the successor in title to the crown of England and certain of its grantees with respect to exclusive rights in the seabed and subsoil in question which were possessed by the crown of England and its grantees prior to the adoption of the United States Constitution, and that neither by virtue of anything in the Constitution nor otherwise have such rights been lost or transferred from the States to the United States.

The Answer of the State of Florida, on the other hand, relied solely for the source of its alleged title on a provision of its Constitution of 1868, approved and accepted by the United States Congress, which defined Florida's boundary in the Atlantic Ocean as the edge of the Gulf Stream. In Paragraph V of its Answer, Florida expressly disclaimed asserting any claim other than that said to flow from the boundary provision of its 1868 Constitution. In Paragraph VIII of its Answer, Florida raised a question concerning the location of the dividing line between the Gulf of Mexico and the Atlantic Ocean.

In January 1970 the United States filed a Motion for Judgment. In the brief accompanying its motion, the United States argued that all the contentions of the defendant States were precluded by this Court's decision in *United States v. California*, 332 U.S. 19, and subse-

quent cases.[1] These decisions, plaintiff argued, conclusively established that the Atlantic coastal States "had no rights in the submerged lands or natural resources seaward of the low-water line and outer limit of inland waters" during the colonial period, but that such rights had come into existence *ab initio* only after the formation of the Union and in favor of the Federal Government (pp. 21-23).

On January 30, 1970, the States of Delaware, Maine, Maryland, Massachusetts, New Hampshire, Rhode Island, South Carolina and Virginia filed a motion for reference of the case to a special master. The moving States proposed that "the case should be referred to a master to take evidence, making findings of fact, conclusions of law and recommendations for decree, and that the master be specially instructed to consider and report upon the scope and validity of the historical claims of the States to the submerged lands in question" (p. 2). The moving States contended that, not having been parties to the *California* and subsequent cases, they were not bound by the decisions in those cases, and that they intended "to offer proof substantiating" their historic titles to the seabed and subsoil rights in question "and showing that any past rejection of them was error" (p. 8). Separate motions for reference of the case to a special master were filed by New York, New Jersey and Georgia.

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[1] However, when Massachusetts sought leave to intervene in the *California* case when that action was pending in this Court, plaintiff had successfully opposed such intervention, stating: "Massachusetts cannot be affected by any judgment which may be enforced in this suit." Memorandum in opposition to motion of Massachusetts for leave to intervene, p. 1.

Florida also filed a motion for reference to a master, but in addition moved for severance of Florida from the other twelve States and for trial of Florida's case separately.

On June 8, 1970, the Court granted the various motions for appointment of a special master and appointed the Honorable Albert B. Maris, with authority to conduct evidentiary hearings and "to submit such reports as he may deem appropriate." The Court did not rule on Florida's motion for severance.

On December 18, 1970, Florida filed with the Special Master a memorandum of law in support of its motion for severance. Florida argued that severance was appropriate "since its boundary claims rest upon questions of law and fact entirely distinct from those applicable to the other defendant States, and, further, that . . . said boundary claim arises from an event or transaction entirely distinct from the events applicable to the other defendant States" (p. 1). Florida reiterated that its sole reliance was "upon express Congressional approval of her maritime boundaries at the time it was readmitted to the Union in 1868" (*ibid.*).

On January 8, 1971, the Common Counsel States[2] filed with the Special Master an answer to Florida's motion for severance, stating that they took no position thereon. The United States filed a memorandum opposing severance on the ground that the same underlying

[2] As used herein, and in the proceedings before the Special Master, this term refers to the States of Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island and Virginia, all of which were represented by the same joint counsel (as well as by their Attorneys General) before the Master.

constitutional and legal issues were involved with respect both to Florida and to the other defendant States. On January 14, 1971, the Special Master issued an order granting Florida's motion for severance.

On February 5, 1971, the United States, by the Solicitor General, addressed a letter to the Special Master suggesting that the Master submit to the Court a report recommending severance of Florida from Original No. 35 and consolidation of the issues respecting Florida with certain outstanding Florida-related issues in *United States v. Louisiana et al.*, Original No. 9. The Solicitor General's letter contained the following:

> "[T]he United States does not want to argue twice – once as to the twelve States remaining in No. 35, Original and again as to Florida in No. 9, Original – questions of colonial or constitutional law common to the Atlantic coast claims in both cases. It was our understanding that you did not intend to place us in that position, and it is our understanding from Florida's Amended Answer and from discussions with counsel for Florida that Florida does not intend to argue such questions, though it reserves the right to claim the benefit of any applicable ruling that the Court may make regarding those questions as to the twelve States remaining in No. 35, Original."

The proposed order suggested by the Solicitor General, and appended to his letter, carried through the above thought by the following proposed provisions:

> "It appears that the State of Florida, while reserving its right to the benefit of any applicable ruling that the Court may make in this case, does not itself intend to present any evidence or to make any argument with respect to the defenses raised by the other defendants herein – namely, those

defenses based upon the alleged rights of British colonies under colonial grants or charters, or based upon a claim that States of the Union have constitutional rights of a proprietary character in the submerged lands and natural resources of the bed of the territorial sea within their boundaries."

* * * * *

"This order is made upon the condition that in No. 9, Original, the State of Florida will not present any evidence or make any argument with respect to the rights of British colonies under colonial grants or charters, or with respect to any claim that States of the Union have purely constitutional rights of a proprietary character in the submerged lands or natural resources of the bed of the territorial sea within their boundaries; but the State of Florida shall be entitled in No. 9, Original, to the benefit of any determination that the Court may make in No. 35, Original, with respect to those questions, to the extent that such determination may be relevant and applicable to the factual situation of the State of Florida."

On March 29, 1971, the Special Master issued his Report Upon Motion of the State of Florida for Severance. The Master agreed that Florida's claim, resting as it did solely on the Constitution of 1868, "is entirely different from those of the other defendant states" (p. 2). The Master concluded (p. 3):

"On the basis of the position of Florida as thus stated, it appeared to me that while there are undoubtedly questions of law and probably also of fact common to the causes of action of the United States against the 12 defendant states other than Florida which have been joined in this action, there are no questions of law or fact, except possibly with respect to the construction of the Submerged Lands

Act, common to those 12 causes of action and the cause of action asserted against the State of Florida. I accordingly concluded that the cause of action against Florida was misjoined with the other 12 causes of action in this case and should be severed and proceeded with separately, as provided by Rule 21, F.R.C.P. Counsel for the United States agreed with this view."

At pp. 5-6, the Special Master adopted the condition quoted above, suggested by the United States, which limited the evidence and arguments which Florida could present in the recommended severed and consolidated proceeding:

"This order should be upon the condition that the State of Florida will not present any evidence or make any argument in the consolidated cause with respect to the rights of the British colonies under colonial grants or charters, or with respect to any claim that the States of the Union have purely constitutional rights of a proprietary character in the submerged lands or the bed of the sea adjacent to their coasts; but the State of Florida should be entitled in the consolidated cause to the benefit of any determination that the Court may make in No. 35, Original, with respect to those questions to the extent that such a determination may be relevant and applicable to the factual situation of the State of Florida."

On March 29, 1971, the United States and the State of Florida filed a Joint Motion in No. 9 Original to implement the Special Master's Report by consolidating the Florida-related issues in No. 9 Original and No. 35 Original and to appoint a special master. On June 28, 1971, the Court granted this motion, as well as Florida's motion for severance, and appointed Judge Maris Special

Master in the new consolidated proceeding, which was docketed as No. 52 Original.

2. *Evidentiary Proceedings in Original No. 35*

In the meantime, proceedings had begun before the Special Master in No. 35 Original, involving the twelve defendant States other than Florida, with a conference on July 28, 1970. Those proceedings have continued for almost four years. Briefing was completed in March 1974, and the case is now pending before the Special Master for his report. Evidentiary hearings were held before the Special Master totaling 14 days of testimony, with a transcript of 2,800 pages. The testimony of ten expert witnesses was heard: five on behalf of the United States, four on behalf of the Common Counsel States, and one on behalf of the State of Virginia. Plaintiff and all the defendant States introduced voluminous exhibits, totaling 1,257 in number and amounting to many thousands of pages. The briefing schedule has involved more than one year, and briefs totaling some 1,200 pages have been filed.

In these proceedings the defendant States have introduced massive evidence, never previously before this Court, to establish that they have valid historic titles to the seabed and subsoil resources at issue in Original No. 35, notwithstanding the Court's belief in the *California* case, arrived at without the benefit of any evidentiary record, that no such historic titles existed.[3] For the

[3]Original No. 35 is the first of the "tidelands" or continental-shelf cases which the Court has referred to a Special Master for evidentiary proceedings bearing on the underlying legal issues. In the *California* and all succeeding cases those issues were decided on the pleadings and briefs alone.

convenience of the Court, amici curiae file herewith ten copies of the Brief for the Common Counsel States (Annex 1 hereto, volumes 1 and 2) and of the Rejoinder Brief for the Common Counsel States (Annex 2), submitted to the Special Master, in which the contentions made in Original No. 35 are fully set forth together with the evidentiary basis for them.[4]

At pp. 4-5 of their Brief (Annex 1, volume 1) the Common Counsel States summarized their contentions as follows:

> "Very briefly, the position of the Common Counsel States is that the record establishes that under the law and practice of England prior to and during the 17th and 18th centuries the seabed comprising the continental shelf of England and of English possessions was subject to an exclusive right of exploitation in favor of the English crown. In that period no generally recognized principle of international law prohibited or denied that exclusive right to the English crown. During the period 1492 to 1776, England acquired by right of discovery and the performance of symbolic acts of sovereignty the territories now comprising the defendant States and the adjacent continental shelf. During that period the crown granted its right of exploitation over part or all of that continental shelf to colonial proprietorships and governments. At American indepen-

[4] The purpose of this submission is not, of course, to litigate the issues in Original No. 35 in advance of the Special Master's Report. Rather, the briefs are submitted to show the nature of the contentions involved and to give some indication of the extensive supporting evidence which will be included in the record in Original No. 35.

dence those rights passed individually to the successor independent States. If any portion of the Atlantic continental shelf was not granted to the colonial proprietorships and governments by the crown prior to 1776, then such portions were retained by the crown until they passed to the adjacent coastal States individually at independence.

"Nothing has occurred since 1776 which has divested the defendant States of the right of exploitation of the continental shelf which they had thus acquired. The States preserved their respective rights when they entered into the Articles of Confederation and into the Constitution of the United States. Nor have those rights been divested by any acts of abandonment or renunciation on the part either of the United States or of the States from 1776 down to the present, or by operation of international law. Thus they still exist in their full force and vigor.

"Finally, even if it should be held, contrary to our submission, that the exclusive right here at issue did not exist on behalf of any one prior to 1945, but came into existence as a wholly new right between 1945 and 1958, then it is the position of the Common Counsel States that it came into existence as a right of the States rather than of the Federal Government, because of the allocation of powers and property incorporated in our Constitution, and particularly because of the status of the defendant States as residual sovereigns of their land territory and as owners of the unallocated or ungranted public lands within their territories or appurtenant thereto."

Each of the above contentions involves important questions of fact which this Court has never decided on the basis of an evidentiary record, though it expressed

views respecting many of them without such a record in the *California* case. The evidence submitted by amici curiae to the Special Master included the testimony of expert witnesses who testified in detail that the seabed and subsoil rights at issue were owned by the crown of England long before plaintiff came into existence and were fully recognized by English law, American colonial law and international law long prior to 1776. Amici's experts also testified, on a factual basis, that it was never intended that such rights be extinguished or transferred to the Federal Government during the revolutionary or Confederation periods or pursuant to the Constitution, but rather that factual analysis demonstrates that these rights were intended to, and did, remain with the individual States as successors in title to the antecedent colonial governments and to the English crown. Further, amici introduced expert testimony and other evidence to show that there is no inconsistency between State ownership of these rights and the federal foreign affairs and defense powers as was assumed in the *California* decision.[5]

The proposed findings of fact and conclusions of law submitted by the Common Counsel States to the Special

[5] The witnesses for the Common Counsel States were Lyman B. Kirkpatrick, Jr., Professor of Political Science at Brown University and former Executive Director of the Central Intelligence Agency; Morton J. Horwitz, Assistant Professor of Law at Harvard Law School; Philip C. Jessup, former Judge of the International Court of Justice and former Hamilton Fish Professor of International Law and Diplomacy at Columbia University, and Joseph H. Smith, George Welwood Murray Professor of Legal History at Columbia Law School. Virginia's witness was David H. Flaherty, Assistant Professor of History at the University of Virginia.

Master in Original No. 35 are set forth at the beginning of the Brief for the Common Counsel States (Annex 1, volume 1), pp. F-1 *et seq.* Many of these proposed findings and conclusions would, if accepted by the Special Master, require this Court to reexamine statements relating to historical fact and to the factual basis for conclusions of constitutional law made by this Court in the *California* case. See, *e.g.*, Findings and Conclusions 1, 8, 12, 22-45, 50-53, 55, 64-70. Amici have, in short, pursuant to the clear mandate given to the Special Master by this Court in granting the motions for reference to a master, asked the Special Master to make a thoroughgoing examination of the factual underpinnings of amici's case even though this could involve conclusions directly at variance with views expressed by this Court in *California* without the benefit of an evidentiary record.

The United States has not disagreed with amici that these issues are properly before the Special Master. The United States has itself introduced voluminous evidence on these issues, and presented the testimony of five witnesses treating the same subjects as those dealt with by amici's witnesses. The several briefs filed by the United States do not dispute the relevance of any of these issues, but rather argue all of them on their merits. The United States has indeed relied heavily on the *California* decision, but recognizes that that decision cannot dispose of the issues in the context of the reference to the Special Master, and has confined itself to contending that the *California* and subsequent decisions place "a heavy burden" on amici in demonstrating the erroneousness of the views expressed in those decisions. Brief of the United States, pp. 25-29. The United States' proposed findings of fact and conclusions of law likewise deal with the merits of amici's contentions and evidentiary presentation.

In their Rejoinder Brief (Annex 2), pp. 2-3, the Common Counsel States summarized their position on *California* as follows:

> "We think it so clear as not to require extended discussion that in declining to grant plaintiff's motion for judgment on the pleadings, and in granting the motion of the Common Counsel States for reference to a Special Master, the Supreme Court indicated its desire that the States' contentions be examined on their merits, rather than being foreclosed at the outset by reliance on the *California* decision as plaintiff had urged. So far as that requires, the Special Master has a mandate to take a wholly fresh look at the soundness of the *California* and subsequent decisions and to recommend in his report that they be overruled if they are found to have been historically and constitutionally unsound. Otherwise the entire proceeding before the Special Master would have been a pointless exercise. As we understand plaintiff's position, it recognizes that the Special Master may properly recommend the overruling of *California*, but contends that he should do so only if defendants have sustained 'a heavy burden.' We think this position is inconsistent with the desire for a fresh evaluation which the Supreme Court's action expressed, and also unsound for the reasons stated at Br. pp. 5-7. Finally, while we believe it unnecessary that we sustain 'a heavy burden,' we submit that the evidence adduced in this proceeding does decisively demonstrate the historical and constitutional unsoundness of *California* and its progeny."

The United States filed a Response to the Rejoinder Brief, but expressed no disagreement with the position stated above.

3. *Original No. 52: Briefs and Master's Report*

The evidentiary hearings in the severed *Florida* case, which were conducted pursuant to narrow limitations on Florida's right to present evidence (see p. 9, *supra*), were much less extensive than those in Original No. 35. Similarly, the United States refrained from introducing the evidentiary materials which it has introduced on its own behalf in Original No. 35. As a result, briefing was completed in August 1973 and the case was submitted to the Special Master for decision.

In its Brief to the Special Master, notwithstanding the basis on which Florida had been severed from the other twelve States in Original No. 35, the United States took the position that "the question of the extent of state sovereignty under the Constitution is similar with respect to all thirteen States" (Post-Trial Brief of the United States, p. 4). The United States relied heavily on the *California* decision as applicable to all coastal states and as precluding a decision in Florida's favor. After citing *California* and its progeny (*id.* at 11), the United States declared:

> "The dispute in the present case – *i.e.*, who has the right to the natural resources of the seabed and subsoil in the disputed area off the coast of Florida – is similar to the disputes in the cases cited above. Those Supreme Court decisions provide the basic law for resolving this dispute." *Id.* at 12.

In particular, the United States relied on *California* as holding that (1) during the colonial period no seabed or subsoil rights existed in the continental shelf (*id.* at 20); (2) our law prior to 1945 did not recognize, and in fact precluded, any seabed and subsoil rights beyond the three-mile territorial sea (*id.* at 20-21); (3) seabed and subsoil resources, including those in the Atlantic, beyond

three miles were first claimed by President Truman in 1945 (*id.* at 21-22); (4) under the Constitution, the States own only "inland waters," and the bed and subsoil of all waters below low-water mark in the sea belong to the United States unless expressly alienated by it (*id.* at 12-13). Every one of these propositions is a subject of intense controversy in Original No. 35 and has been the subject of extensive evidentiary proceedings and voluminous briefing therein.

Florida's brief relied solely on the approval by Congress of its 1868 Constitution and the maritime boundary described therein. That confirmation, Florida argued, entailed the conveyance by the United States to Florida of exclusive seabed and subsoil rights within the boundary. Post-Trial Brief of the State of Florida, pp. 17-38. This contention, of course, contradicted the view expressed in *California*, relied on by the United States, that no seabed and subsoil rights beyond three miles existed until 1945, and thus that such rights could not have been conveyed to Florida in 1868. Florida was powerless to rebut this contention on historical grounds, since the Special Master's Report on severance had expressly precluded Florida from presenting any evidence or making any argument "with respect to the rights of the British colonies under colonial grants or charters" (p. 9, *supra*). Nor could Florida argue that *California* was wrong as a matter of constitutional law, since the Special Master's Report had also expressly precluded it from presenting evidence or making arguments "with respect to any claim that the States of the Union have purely constitutional rights of a proprietary character in the submerged lands or the bed of the sea adjacent to their coasts" (p. 9, *supra*). Florida was restricted to making the narrow argument that "the holding in the *California*

case has been overruled, in effect, by the submerged lands act." Post-Trial Brief of the State of Florida, p. 32.

Amici were not parties to Original No. 52 and received no notice of any of the proceedings therein or copies of the briefs filed. The Special Master's Report of January 18, 1974, a copy of which was mailed to amici and their counsel by the Special Master, was the first inkling amici had had that issues intimately involved in their own litigation had been raised and argued in Original No. 52.

Given the limitations under which Florida was struggling, the result was almost a foregone conclusion. The Special Master's Report of January 18, 1974, rejected Florida's contentions out of hand:

> "In the opinion of the Court in *United States v. California*, 1947, 332 U.S. 19, 38-39, it was expressly held that the United States, rather than the State of California, has paramount rights in and power over the marginal belt of territorial sea, an incident of which is full dominion over the resources of the seabed within that water area . . . Later, the Court expressly pointed out that the doctrine of *United States v. California*, 1947, 332 U.S. 19, is applicable to all coastal states. *United States v. Louisiana*, 1960, 363 U.S. 1, 7.
>
> "The State of Florida contends that the United States accepted the cession of Florida from Spain as a trustee for the states later to be created from that territory, that the cession included rights of ownership in the maritime belt of territorial sea along its coasts and that when the State of Florida was admitted to the Union it received those rights as trustee for its people. *Pollard's Lessee v. Hagan*, 1845, 3 How. (U.S.) 212 and *Shively v. Bowlby*, 1894, 152 U.S. 1, are relied upon to support this position. It is a sufficient answer to this contention, however, to recall that the doctrine of these cases

was restricted by the Court in *United States v. California*, 1947, 332 U.S. 19, 36, to the inland waters of a state shoreward of the low-water mark along its coast and that the doctrine is not applicable, as the State of Florida contends, to the seabed of the ocean seaward from the low-water mark." Report, pp. 9-10.

4. *Comments of the Parties in Original No. 35 on the Special Master's Report in Original No. 52*

The Rejoinder Brief for the Common Counsel States in Original No. 35 (Annex 2), filed a few weeks after the Special Master's Report in Original No. 52, commented on that Report as follows (pp. 4-6):

"In his Report in *United States v. Florida* (Supreme Court, Oct. Term 1973, No. 52 Original, January 18, 1974), the Special Master relied on *United States v. California* in rejecting Florida's claims, and pointed out the language in *Louisiana* to the effect that *California* is 'applicable to all coastal States.' Report, pp. 9-11."

* * * * *

"We believe that the Special Master's reliance on *California* in his Florida Report was conditional upon the following language of his earlier Report recommending severance: 'Florida disclaimed any intention to claim any rights derived from England under colonial grants or charters or any purely constitutional rights of a proprietary character in its capacity as a state of the Union, except that if any such rights should hereafter be determined in this case to exist with respect to any of the other 12 defendant states, Florida would want to be entitled to the benefit of that determination to the extent relevant and applicable to its factual situation.' Report of the Special Master upon Motion of the State of Florida for Severance, p. 3. We think it

apparent that the effect of the above language was to hold the question of the validity of *California* in abeyance in the *Florida* litigation, with Florida later to obtain the benefit of any overruling of *California* in the instant litigation 'to the extent relevant and applicable to its factual situation.' Consequently, the Report in applying *California* to Florida's case presumably did so by assuming the correctness of that decision *arguendo* and did not foreclose Florida, let alone the Common Counsel States, from the benefits which might accrue if, in this case, the Master determines to recommend that *California* be overruled."

The United States filed a Response to the Rejoinder Brief from which the above passage is quoted, but in that Response did not take issue with or comment in any way upon the above passage.

ARGUMENT

Florida's case is now before the Court. The case of the other twelve Atlantic States has been submitted to the Special Master and will doubtless be before the Court next Term, probably early next Term. Amici urge that this Court postpone argument and decision in the instant case for the short time until Original No. 35 is also brought before it. The basis for this request is severalfold.

First, the two cases are interrelated and consideration of them together will assure that common issues are determined on the most complete evidentiary record. Notwithstanding the basis on which the *Florida* case was severed from that of the other States, it is now apparent from the briefs and arguments, and from the Special Master's Report in Original No. 52, that both cases share in common a number of issues of critical importance. Among those issues are the following:

1. Whether any title or proprietary rights existed in the seabed and subsoil of the Atlantic continental shelf beyond three miles prior to 1945.

2. Whether such proprietary interests as the States might otherwise have had in the seabed and subsoil are consistent, in light of relevant factual, historical and constitutional considerations, with the relationship of the States and the Federal Government.

3. Generally, whether certain views expressed by the Court in *United States v. California*, concerning or involving the history of seabed and subsoil rights and claims in English, American colonial, early American federal and international law and practice, should be reaffirmed and applied without change to the Atlantic continental shelf, or whether upon reexamination they should be modified in various respects.

In the instant case, the Court is being asked by the United States to adopt for the first time the *ratio decidendi*, dicta and factual assumptions and conclusions of the *California* decision in a case involving State versus federal ownership of seabed and subsoil rights in the Atlantic continental shelf. Yet the record and argument in this case were developed without the participation of amici – that is, without twelve of the thirteen Atlantic coastal States – and under limitations which expressly precluded Florida from making any effective argument that *California* should not be so applied. In Original No. 35, on the other hand, the interested parties have participated and a full record on the relevant issues has been made. Only through review of the forthcoming Special Master's Report in Original No. 35 can this Court determine on an adequate record whether views expressed in *California* should be applied to the Atlantic seaboard or not. Only Original No. 35 has involved the

complete evidentiary analysis of the relevant issues which this Court obviously contemplated and desired when it referred the original, unsevered case to a Special Master.

It is, of course, common practice for this Court to consider together interrelated cases involving common issues. This course serves to avoid duplication and allows all relevant issues to be resolved at the same time. This approach is especially appropriate here, moreover, because it is Original No. 35 that will provide the essential factual background against which the common issues must be evaluated and resolved.

Second, amici believe they could be seriously prejudiced if the Court were to proceed to decide Original No. 52 before receiving the Special Master's Report in Original No. 35. The position of amici throughout has been that only evidentiary hearings could lay a proper basis for determining whether views expressed in *California* were still viable and should be applied to the Atlantic continental shelf. This Court obviously believed that evidentiary hearings would assist it in resolving these questions, since it rejected the motion of the United States for summary disposition and granted the motions of the States for reference of the case to a special master.

That evidentiary basis has now been fully laid, and within a few months the Court will have the benefit of the analysis of it by an exceptionally able and distinguished Special Master. No interest will be harmed if the Court waits to avail itself of these important advantages before moving to decide issues necessarily and inextricably involving the continued vitality *vel non* of the California doctrines and their applicability to the Atlantic continental shelf. On the other hand, an affirmance by the Court of the Special Master's *Florida* Report, without waiting for his report in Original No. 35,

would create precedents injurious to the interests of amici and in their view wholly unsound. In the light of the imminence of the time when the Court will be in a posture permitting orderly decision of the issues, a short delay in the disposition of the *Florida* case is fully justified and indeed essential.

The outcome of this litigation is of immense importance to the Atlantic coastal States, since it will determine whether and to what extent they retain proprietary interests in the vast and valuable mineral resources lying off their shores. Amici have already devoted great time and expense to providing the Special Master with extensive expert testimony and documentary evidence to establish their claims and to refute factual and policy contentions of the United States made on its own behalf. Amici respectfully but earnestly suggest that fairness to them warrants delaying the resolution of this case until amici can also be heard and can make available to the Court the full factual record now being appraised by the Special Master.

Third, there can be no significant prejudice to any party from the short delay here sought in the disposition of this case. The United States may contend that it is important to expedite the decision in this case in order to begin exploitation of the undersea resources lying off Florida's coasts. The relief amici seek applies only to that aspect of the case in which Florida seeks to establish, on the basis of its 1868 Constitution and the approval thereof by Congress, its entitlement to seabed and subsoil rights in the Atlantic Ocean beyond three miles. On the basis of the Special Master's Report and the briefs to him in Original No. 52, there is no overlap of facts or issues between that case and Original No. 35 with respect to the issues regarding the dividing line between the Atlantic and the Gulf of Mexico or regarding Florida's claim to certain alleged historic bays as internal waters. It appears

more reasonable to postpone disposition of this case as a whole; but if the United States should contend that there is some reason for expedition in deciding any of these issues, it would be feasible for the Court to decide them while preserving the issues overlapping Original No. 35 for disposition along with that case next Term.

If the United States should contend that there is some reason for expedition in deciding the issues which overlap Original No. 35, the short answer is that the United States cannot in any event obtain clear title to the Atlantic outer continental shelf off Florida prior to the decision of Original No. 35. This is so because of Florida's entitlement "to the benefit of any determination that the Court may make in No. 35, Original, with respect to those questions to the extent that such a determination may be relevant and applicable to the factual situation of the state of Florida." Report of the Special Master Upon Motion of the State of Florida for Severance, see p. 9, *supra*.

Moreover, the delay cannot be substantial in any event. The report of the Special Master is expected at any time and Original No. 35 should be ripe for disposition by this Court at its next Term. This litigation has been pending for several years and the United States has not heretofore argued that there were extraordinary reasons requiring special expedition. In view of the time and effort already devoted to the litigation, there is all the more reason to

follow the course that will result in the most orderly and mature disposition of the common issues.

Respectfully submitted,

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April 24, 1974

CERTIFICATE OF SERVICE

I hereby certify that I have this 24th day of April caused three copies of the foregoing Brief of Amici Curiae to be mailed, postage prepaid, to The Honorable Robert H. Bork, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, and to W. Robert Olive, Jr., Esquire, Special Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32304.

BRICE M. CLAGETT

April 24, 1974

SUBJECT INDEX

Defendant's Exceptions to Report of Special Master 1
Introduction 5
ARGUMENT: POINT I–Exceptions to the legal premise upon which the Master approached the issues 7
A. The doctrine announced in *United States v. California* is inappropriate to the instant case 7
B. The Submerged Lands Act did not re-write Florida's historic boundaries 15
ARGUMENT: POINT II–The specific findings and exceptions 18
A. Florida's boundary (as contained in Article I of Florida's 1868 Constitution–Florida's historic and lawful boundary) .. 18
B. Florida's Historic boundary was not limited by the 1962 Amendment to the 1885 Constitution of Florida 28
C. Florida's Historical Inland Water Claim 31
1. Concept of historic waters 32
2. Florida Bay 37
3. The boundary between the Atlantic Ocean and the Gulf of Mexico is at Latitude 25° 40′ North 50
4. Florida's Claim to Florida Bay as a Juridical Bay 57
Summary 59

TABLE OF AUTHORITIES

Cases

Askew v. American Waterways, Inc. 411 U.S. 325 (1973) 50
Carter v. Carter Coal Co., 298 U.S. 238 (1935) 13
Central R.R. Co. v. Jersey City, 208 U.S. 473 (1907) 13
Coastal Petroleum Company v. Secretary of the Army, et al., 318 F.Supp. 845 (S.D. Fla. 1971) 12
Coyle v. Smith, 221 U.S. 559 (1910) 13
Currier v. Nelson, 96 Cal. 505 (1892) 26
Hilton v. Guyot, 159 U.S. 113 (1895) 33
Keith v. Clark, 97 U.S. 454 (1878) 13
M'Ivers Lesse v. Walker, 4 Wheat (U.S.) 444, (1819) 26
Lane County v. Oregon, 7 Wall (74 U.S.) 71 (1868) 13
Louisiana v. Mississippi, 202 U.S. 1 (1906) 13, 16
McCulloch v. Maryland, 4 Wheat (U.S.) 316 (1819) 13
Manchester v. Massachusetts, 139 U.S. 240 (1891) 50
Michigan v. Ohio, 404 U.S. 933 (1971) [No. 30 Original] 26, 27
New Mexico v. Colorado, 267 U.S. 30 (1924) 17

Oklahoma v. Texas, 272 U.S. 21 (1926) 17
The Paquette Habana, 175 U.S. 677 (1899) 32
Peterson v. U.S., 191 F.2d 154 (1951) 30, 31
Pollard's Lesse v. Hagan, 3 Howard (U.S.) 212 (1945) .. 12, 13, 14
Pope v. Blanton, 10 F.Supp. 18 (N.D. Fla. 1935) 9
Skiriotes v. Florida, 313 U.S. 69 (1940) 13
Sowles v. Minor, 82 Vt. 344, 73 A. 1025 (1909) 26
State v. Muncie Pulp Co., 119 Tenn. 47, 104 S.W. 437 (1907) 17
Texas v. White, 7 Wall (74 U.S.) 700 (1968) 13
United Kingdom v. Norway, (1951) International Court of Justice, Rep. 116 ..... 32, 33, 36
United States v. California, 332 U.S. 19 (1947) .. 7, 8, 9, 12, 14, 50
United States v. Florida, 363 U.S. 121 (1960) [No. 9 Original] 8, 9, 11, 18
United States v. Florida, Tallahassee Civil Action No. 1672 (D.C., Fla., December, 1970) 48
United States v. Louisiana, 339 U.S. 699 (1949) 10
United States v. Louisiana, 394 U.S. 11 (1969) 32, 38
United States v. Texas, 339 U.S. 707 (1949) 9
Utah v. United States, 403 U.S. 9, (1971) 13

United States Constitution

Article IV, Section 3 ..... 17, 29

Statutes and Treaties

Outer Continental Shelf Lands Act of 1953, 67 Stat. 462 25
Treaty of Amity, Settlement and Limits between U.S. and Spain (1819) Article 2 40
33 U.S.C. § 1 et seq. 12
43 U.S.C. § 1301 ..... 11, 50
43 U.S.C. § 1301 (c) 19
43 U.S.C. § 1301 (4) 30
Act of June 25 1868 (15 Stat. 73) 1, 15, 59

Florida Constitution

1868 Constitution of Florida 15, 18, 22, 24
1885 Constitution of Florida, (Amendment to Article 1) 1

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Section 370.21—Florida Territorial Water Act 45, 46

Laws of Florida

Chapter 29744, 1955 ..... 1, 29, 52, 53
Chapter 71-348, 1971 53
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Chapter 57-358, 1957 45
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tariat on Historic Bays) 33
U.N. Doc. A/conf. 13/1 at 37 (Ser. L.O.N.P. 1930, V. 16, pg. 107) 37
U.N. Doc. A/Conf. 13/L. 52 and ratified by the United States on
March 24, 1961. See 15 U.S.T. (pt. 2) 1606 32
U.N. Doc. A/Cn. 4/143 at 31-34 33

Other

91 Congressional Record 9623 7
99 Congressional Record 2830 15
1930 Conference on the Codification of International Law of the U.S.
1958 Territorial Sea Convention 32
Article 12, Paragraph 1 ..... 34, 37
Article 7, Paragraph 4 ..... 34, 37
Joint Pre-Hearing Statement dated 1971
(executed by Ervin Griswold, Solicitor
General of the United States) 32
Bulletin of the Geological Society of America, (1972
Edition), "Geology & History of the Gulf of Mexico" 55
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Limits of Oceans and Seas 50

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 52, ORIGINAL

UNITED STATES OF AMERICA
Plaintiff,

-v-

STATE OF FLORIDA,
Defendant.

DEFENDANT'S EXCEPTIONS TO REPORT OF SPECIAL MASTER

The Defendant, State of Florida, by its undersigned attorneys, files the following exceptions to the Special Master's Report bearing date of January 18, 1974 heretofore filed in this cause:

1. That the Master erred wherein he found that the act of June 25, 1868, 15 Stat. 73, approving Florida's boundary was not an express or implied grant to the State of Florida of the right, title and interest possessed by the United States within such area or of such rights and interests subsequently acquired by the United States.

2. That the Master erred wherein he found that Chapter 29744, Laws of Florida, 1955 and the November 6, 1962 Amendment to Article I of the 1885 Constitution of Florida had the effect of abandoning claim by the State of Florida in

the seabed beyond three miles in the Atlantic Ocean and three leagues in the Gulf of Mexico.

3. That the Master erred wherein he found that the dividing line between the Gulf of Mexico from the Atlantic Ocean is a line running due north along the meridian of longitude 83 degrees west, from the coast of Cuba to latitude 24 degress 25 minutes north; thence due east along the parallel of latitude 24 degrees 35 minutes north to Rebecca Shoal, at longitude 82 degrees 34 minutes west; thence along the shoals and the Florida Keys to the mainland at the eastern end of Florida Bay. The Master should have found that the Florida Keys and the straits of Florida southwest of longitude 25 degrees 40 minutes north are to be considered part of the Gulf of Mexico, not the Atlantic Ocean.

4. That the Master erred wherein he construes that portion of the 1868 Constitution of Florida which reads: "then down the middle of said river (the St. Marys) to the Atlantic Ocean, thence southwestardly along the coast to the edge of the Gulf Stream;" to mean that Florida by virtue of its 1868 Constitution has no marine boundary on the Atlantic Coast from the mouth of the St. Marys River to a point one geographic mile north of the Lake Worth inlet.

5. That the Master erred wherein he construes that segment of the 1868 Florida Constitutional Boundary which reads: "thence northeastwardly to a point three leagues from the mainland" to mean the boundary of the State of Florida in that part of the Gulf of Mexico is a line from the Dry Tortugas Islands to Cape Romano at a uniform distance of three marine leagues seaward from the coastline of the State. He should have found that the boundary from the Dry Tortugas Islands to Cape Romano is a straight line north 045 degrees east drawn from a point three leagues north of the northern most island of the Tortugas to a point three leagues from the mainland.

6. That the Master erred wherein he found the location of the present State boundary for the purposes of the Submerged Lands Act to be defined as follows:

> Marine boundary of the mainland and Florida Keys. Beginning at a point in the middle of the St. Mary's River at its mouth in the Atlantic Ocean north of Amelia Island, and extending thence seaward in the Atlantic Ocean three geographical miles from the coastline; thence in a general southerly direction following the coastline of the State and of the Florida Keys and three geographical miles seaward therefrom to a point in latitude 24 degrees 35 minutes north which is three geographical miles westwardly from the coast of the most westerly of the Marquesas Keys; thence due west in latitude 24 degrees 35 minutes north to a point which is three marine leagues westwardly from the most westerly of the Marquesa Keys; thence in a general northerly direction following the coastline of the Marquesa Keys, the lower Florida Keys, the seaward limit of the inland waters of Florida Bay and the coastline of the mainland and three marine leagues seaward therefrom to a point west of the mouth of the Perdido River and three marine leagues distant therefrom; and thence to the mouth of the Perdido River.
>
> Marine boundary of the Dry Tortugas Islands. Beginning at a point in latitude 24 degrees 35 minutes north three geographical miles southeastwardly from the coastline of Garden Key or any low-tide elevation which is southeastward from Garden Key and within three geographical miles thereof; thence in a general westwardly direction following a line three geographical miles seaward from the coastline of the nearest of the Dry Tortugas Islands and low-tide elevations to a point in latitude 24 degrees 35 minutes north three geographical miles southwestardly from Loggerhead Key or any low-tide elevation which is southwestwardly from Loggerhead Key and within three geographical miles thereof; thence due west in latitude 24

degrees 35 minutes north to a point in longitude 83 degrees west; thence due south in longitude 83 degrees west to a point three marine leagues southwestwardly from Loggerhead Key or any low-tide elevation which is southwestwardly from Loggerhead Key and within three geographical miles thereof; thence in a general northwestwardly, eastwardly, and southwardly direction following a line three marine leagues seaward from the nearest of the Dry Tortugas Islands and low-tide elevations to a point in latitude 24 degrees 35 minutes north; and thence due west in latitude 24 degrees 35 minutes north to the place of beginning.

7. That the Master erred wherein he found that the body of water bordered on the south by the Florida Keys, on the northeast by the mainland and on the northwest by a line north 045 degrees east drawn from the Dry Tortugas Islands to the mainland, referred to by the State of Florida as Florida Bay, is not historic waters or an historic bay; or, in the alternative, he erred where he found the area encompassed by a closing line drawn from the East Cape or Cape Sable to the Spanish banks low-tide elevation northeast of Spanish Key is not a juridical bay.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 52, ORIGINAL

UNITED STATES OF AMERICA,
Plaintiff,

-v-

STATE OF FLORIDA,
Defendant.

BRIEF IN SUPPORT OF EXCEPTIONS

INTRODUCTION

The State of Florida has filed seven exceptions to the Master's Report bearing date of January 18, 1974 filed in this cause. the exceptions are grounded on the contention of defendant that the Master's findings of fact, as related to the exceptions, are unsupported by any substantial evidence or are contrary to the clear weight of the evidence and/or based on a mistaken view of the controlling law, and request this Court to reject said report as excepted.

The history of this case is accurately stated on pages 1 through 6 of the Report of the Master and the State of Florida, hereinafter referred to as "Florida," does not dispute such statement; however, Florida wishes to emphasize that as a condition of the stipulation for severance filed with this Court, Florida is entitled to any relief afforded the several defendants in *U. S. v. Maine*, et al, 35 Original, and rest on this condition

to request by separate motion this Court's indulgence in postponement of a decision in the matter *sub judice* until the Court may simultaneously rule in the *Maine* case.

The parties are referred to as they appeared before the Master or by name. Reference to the Master's Report is made by the abbreviation (MR). Reference to the Transcript of Testimony is made by the abbreviation (TR).

This brief will argue the exceptions to the Master's Report by subject matter rather than by itemized exceptions because of the inter-relationship of one issue to another and such presentation seems more logical to the development of Florida's case.

ARGUMENT

Point I

Exceptions to the Legal Premise Upon Which the Master Approached Issues

I.

Neither the California Doctrine Nor the Submerged Lands Act Is Properly Applied by the Special Master

A. The doctrine announced in United States–vs–California is inappropriate to the instant case.

> *"It is upon that basis, Mr. President, that I believe, as a representative of the State of Michigan, that we in Congress should wait and not pass this legislation until the Supreme Court of the United States decides the specific instant case before it, which deals with the ownership of the 3-mile marginal sea off the coast of California. It has nothing to do with the Great Lakes. It has nothing to do with what the ownership of the Thirteen Original States might be. It will solve one problem. It will solve the question of the ownership of the lands off the coast of California which we acquired by purchase from Mexico. The whole question involved . . . is: What did we purchase from Mexico?"*[1]

> *"Later, the court expressly pointed out that the Doctrine of United States v. California . . . is applicable to all coastal states.*[2]

The California Doctrine is appropriate to the instant case only if the National Government asserts a 'paramount right' (332 U.S. at 36) to the seabed within Florida's offshore boundaries. Florida does not understand this to be the Government's claim. That issue was settled conclusively almost a decade

[1] Senator Ferguson in debate on whether to quit-claim marginal seas via H. J. Res. 225, which passed the Congress and was promptly vetoed by President Truman; from Congressional Record, July 22, 1946, p. 9623.

[2] Report of the Special Master, pg. 10.

before this case was filed. See, *United States -vs- Florida*, 363 U.S. 121 (1960) (No. 9 Original). Therefore, Florida takes exception to a discussion of paramount rights within the marginal seas; such is not at issue.

Rather, the 'whole question' here arises from a challenge by the National Government to Florida's territorial integrity. The challenge comes about by the simple expediency of denying the State's historical boundaries. The question is not what happens within them, but where are they?

Questions underlying this core issue evoke dicta from several cases, and it may be that Court comment in *United States -vs- California* will be helpful in treating these questions. But this is not an occasion in which ponderous questions of war and peace and international commerce must be resolved in the ruling. This is, rather, an occasion for considering *boundaries;* a quiet issue compared to that at Bar in *California*. It is a domestic matter, with consequences municipal instead of international. The nature of the case, then, makes application of the heavy California Doctrine not only unnecessary, but erroneous.

In the California Case, the cause for concern was a question of who, as between the State or National Government, was to hold the key to development and exploitation of natural resources beneath the marginal sea. California's claim was based upon an historic three-mile boundary described in the 1849 Constitution effective when it joined the Union. The question of its Constitutional boundary was broached, passed quickly by, and ignored in the rationale of the case. The marginal sea was not treated as being within State boundaries, but as a three-mile strip adjacent to the coast. For all practical purposes, the opinion deemed California's boundaries to have stopped at the shoreline. This is a crucial distinction between *United States -vs- California* and the present case.

Here we begin with the presumption that, included *within state boundaries* is certain territory seaward of the beach which the complainant asserts, and the Special Master apparently agrees, to be subject to exclusive disposition by the National Government for reason of its navigable surfaces and its seaside locus.

This assertion is a restatement of the California Doctrine. Yet the core of the California Case is conspicuously absent. It was removed by this Court in No. 9 Original. That Florda has marine boundaries situated seaward of its coast was decribed in its 1868 Constitution, considered and approved by Congress, recognized at least inferentially by a lower Federal court, *Pope -vs- Blanton*, 10 F.Supp 18 (ND Fla. 1935), dismissed on other grounds 299 U.S. 521 (1937), and expressly recognized by this Court in United States -vs- Florida, *supra*.

In *California*, this Court found without benefit of an evidentiary hearing that the State had failed to assert *dominium* in the three-mile limits of its marginal sea (even though it had for nearly 20 years sold petroleum leases there without comment from National agencies until the late 1930's). "The first claim to the marginal sea was asserted by the National Government. We held that protection and control of [the marginal sea] were indeed a function of national external sovereignty." *United States -vs- Texas*, 339 U.S. 707, 711-712 (1959). There is little doubt but that the Court considered the California Case to be cast in terms of emphasis upon national sovereignty. At 332 U.S. p. 29:

> • • • The United States here asserts rights in two capacities transcending those of a mere property owner. In one capacity it asserts the right and responsibility to exercise whatever power and dominion are necessary to protect this country against dangers to the security and

tranquility of its people incident to the fact that the United States is located immediately adjacent to the ocean. The Government also appears in its capacity as a member of the family of nations. It asserts that proper exercise of these constitutional responsibilities requires that it have power, unencumbered by state commitments, always to determine what agreements will be made concerning control and use of the marginal sea and the land under it. . . . In the light of the foregoing, our question is whether the state or the Federal Government has the paramount right and power to determine in the first instance when, how, and by what agencies, foreign or domestic, the oil and other resources of the soil of the marginal sea, known or hereafter discovered, may be exploited.

That such is not the nature of the instant case is amplified in *United States -vs- Louisiana*, 339 U.S. 699 (1949), where, at 704 the Court applied the California Doctrine to a definition of extended rights in the marginal sea assumed by Louisiana:

> • • • As we pointed out in United States v. California, the issue in this class of litigation does not turn on title or ownership in the conventional sense. California, like the thirteen original colonies, never acquired ownership in the marginal sea. The claim to our three-mile belt was first asserted by the national government. Protection and control of the area are indeed functions of national external sovereignty. . . . The marginal sea is a national, not a state concern. National interests, national responsibilities, national concerns are involved. The problems of commerce, national defense, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area.
>
> That is the rationale of United States v. California. • • •

The present case, then, does not fall within that 'class of litigation'. *United States -vs- Florida*, 363 U.S. 121 (1960) [No. 9 Original] did fall into that class of litigation, however, and this Court held that the Submerged Lands Act of 1953 (43 USC § § 1301 *et seq*) controlled the issue, reaching a different result than the California and Louisiana cases. Although one aspect of this case is meant to define with greater particularity the boundaries approved by the decree in No. 9 Original (see Report of the Special Master, p. 2), and thus be supplemental to it, the *nature* of the issues is not the same.

While the Court in No. 9 Original agreed that Congress approved Florida's three-league Gulf boundaries after its admission into the Union and before passage of the Submerged Lands Act, it expressly did not decide the extent and location of those boundaries (363 U.S. at 123). Nor did it attempt definition of the Atlantic boundary, or consider the geographical line demarcating the Atlantic Ocean from the Gulf of Mexico. The Court's interest was focused squarely upon the effect of the Submerged Lands Act upon the California Doctrine as applied to the State of Florida.

The *substance* of the conflict described in the California Case was decided in Florida's favor. The geographical *form* that result would take was as described in Florida's 1868 Constitution. Detailed magnification of that *form* was to be the subject of this proceeding. Yet echoes of the California conflict continued to influence the Special Master in his approach to locating with particularity the State's boundary (see, Report of the Special Master, Section B 2, pp. 8-11). Florida respectfully takes exception to this application of the California Doctrine.

Whether war powers, authority over interstate and foreign commerce, or authority in international relations may be exexercised by the National Government within Florida's boundaries, marine or dry land, has never been at issue. These are

the paramount powers described in the California Case, and they may be appropriately exercised by the National Government in any part of any state at any time if they may be exercised at all.

But because they may be 'paramount' in Lake Okeechobee does not mean that Florida cannot regulate fishing therein or the taking of minerals from its bottom. See, *Coastal Petroleum Company* vs. *Secretary of the Army, et al*, 318 F. Supp. 845 (S.D. Fla. 1971).

That the Secretary of the Army may prescribe regulations for navigable use of the St. Johns River does not mean that the State of Florida has ceded that waterway to the National Government (See, 33 U.S.C. § 1 and regulations promulgated thereunder).

That the United States Navy, pursuant to authority delegated under 33 U.S.C. § 3 closed inland waters, vast areas of Florida Bay, and waters in the Florida Keys to all vessels in order that fleet aircraft could engage in live strafing, bombing practice, and gunnery range operations does not mean that these areas are no longer to be included within the State of Florida. (See, 33 C.F.R. § § 204.82, 204.85, 204.86, 204.90, 204.95, *et seq.*)

Paramount powers described in *United States* v. *California* are indeed applicable to all coastal states, and to all non-coastal states as well. But it does not follow that, by virtue of the exercise of this paramount power by the National Government, the State of Florida has surrendered its *eminent domain* over all of the territory within its boundaries. *Pollard's Lessee* -vs- *Hagan*, 3 Howard (U.S.) 212, 223 (1845).

Nor does the instant case sound in terms strictly of title to or ownership of real estate. Certainly, Florida's territory is not something it can *convey*. Florida no more owns its marine territory in fee simple absolute than it does its statehood, its

elected cabinet system of government, or its tourist economy; all are integral parts of the whole. Thus it is not so much a question of what the State of Florida *owns* as it is an inquiry into what the State of Florida *is*.

The State is a political, economic, and geographic unit. It is a member of a Union of similar units, and it has surrendered certain of its sovereignty to that Union as an expression of its interdependence. *Carter v Carter Coal Co.*, 298 U.S. 238, 295 (1935); *Keith v Clark*, 97 U.S. 454 (1878); *Texas v White*, 7 Wall (74 U.S.) 700,721 (1868); *Lane County v Oregon* 7, Wall (74 U.S.) 71, 76, (1868); *McCulloch v Maryland* 4 Wheat. 316, (1819).

But that it has not surrendered all of its sovereignty is the key to the success of that Union. Florida retains and enjoys a certain political and economic integrity coextensive with, and sometimes exceeding, its geographic limits, *Skiriotes -vs- Florida*, 313 U.S. 69 (1940). To the extent that its territorial integrity is subject to divestiture by the Congress or the National judiciary, so too is its political and economic integrity subject to diminishment. This Court has recognized these prnciples in cases past. *Utah v United States*, 403 U.S. 9, (1971); *Coyle v Smith*, 221 U.S. 559 (1910); *Central R.R. Co. v. Jersey City*, 209 U.S. 473, 479 (1907); *Louisiana v Mississippi*, 202 U.S. 48 (1905).

Concepts of Federalism announced in *Pollard's Lessee -vs- Hagan*, 3 *Howard* (U.S.) 212 (1845) bear repeating:

> The right which belongs to the society, or to the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth contained in the State, is called the eminent domain. It is evident that this right is, in certain cases, necessary to him who governs, and is, consequently, a part of the empire, or sovereign power. (Vat. Law of Nations, Sec. 244) This definition shows that the eminent domain, although a sovereign power, does not include all

sovereign power, and this explains the sense in which it is used in this opinion.

• • • This right of eminent domain over the shores and the soils under the navigable waters for all municipal purposes belongs exclusively to the States within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be weilded greatly to the injury of State sovereignty, and deprive the States of the power to exercise a numerous and important class of police powers. But in the hands of the States this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the Constitution. For although the territorial limits of Alabama have extended all her sovereign power into the sea, it is there, as on the shore, but municipal power, subject to the Constitution of the United States, "and the laws which shall be made in pursuance thereof."

• • • The shores of navigable waters, and the soils under them were not granted by the Constitution to the United States, but were reserved to the States respectively.

It is not enough to say that the rule of *Pollard's Lessee* was limited by the California Case to inland areas of the State, and that therefore it is inapporpriate here. For it is the Califronia Doctrine that limits Pollard's Rule, and the Court's recognition of the fact of Florida's historic seaward boundary in No. 9 Original precludes application of the *California* rationale in this case.

Underlying the Special Master's conclusion that Congress, by the Act of June 25, 1868 (15 Stat. 73), did not approve rights to the seabed within territorial waters described in Florida's 1868 Constitution, is a strong and controlling reliance upon the California Doctrine. Florida submits that this reliance is misplaced, and respectfully takes exception thereto.

B. *The Submerged Lands Act did not re-write Florida's historic boundaries.*

> *"Until recently, the Federal Government never thought it owned these lands, and even until now it has never possessed or used them. The lands are still in the possession of the States . . . The passage of the pending proposed legislation will simply permit the States to keep what they have always had since the foundation of the Union."*[8]

In 1868, Congress approved Florida's Constitional boundary "along the edge of the Gulf Stream and Florida Reefs to and including the Tortugas Islands; thence northeastwardly to a point three leagues from the mainland • • • " These calls descibe a continuous, uninterrupted territory. Although a boundary call "along the edge of the Gulf Stream and Florida Reefs" needs more particularity in description, a boundary "to and including the Tortugas Islands" is definitive enough to clearly express a continuing boundary.

Yet the Special Master has concluded that, since the Submerged Lands Act limits boundaries in the Gulf of Mexico to three marine leagues from shore, the 1868 boundary is no longer valid, for the Tortugas Islands tip of the Florida Keys lies too far from the Marquesas, the nearest landward Key. Hence, in a direct confrontation between an unequivocal, unambiguous call in Florida's historical boundary (approved

[8] Senator Daniel in debate on the Submerged Land Act, 99 Congressional Record 2830.

by Congress), and application of the Submerged Lands Act, the Special Master has ignored the intent of Congress set out in Section 3 (a) to recognize and confirm *existing* historical boundaries, and set the Tortugas adrift. Report of the Special Master, pp. 33-36.

This confrontation should have been decided in favor of the State's historic boundary, as, indeed, it could have been, by treating the Florida Keys as a continuing shoal area (as it was in 1868, described *infra*), and by recognizing that there is no authority for the proposition that a State cannot have marine boundaries. In fact, it can have total marine boundaries without offending any concept of domestic or international law.

In a dispute as to which State, Mississippi or Louisiana, owned certain islands in the Gulf of Mexico within the geographic limits defined in both their admission Constitutions, this Court considered that Louisiana had been admitted first, and that Court and Congress were powerless to diminish Louisiana's territory once statehood had been achieved.

> The islands, marsh or otherwise claimed by Louisiana in this case were all within 3 leagues of her coast. The act admitting Mississippi was passed five years after the Louisiana act, yet Mississippi claims thereunder the disputed territory, as being islands within 18 miles of her shore. If it were true that this repugnancy between the two acts existed, it is enough to say that Congress, after the admission of Louisiana, could not take away any portion of that state and give it to the state of Mississippi. The rule, *Qui prior est tempore, portior est jure,* applied, and § 3 of art. 4 of the Constitution does not permit the claims of any particular state to be prejudiced by the exercise of the power of Congress therein conferred.
>
> (*Louisiana -vs- Mississippi,* 202 U.S. 1, 39-41 (1905)

If article 4, Section 3 of the Constitution precludes congressional diminution of the territory of the State of Louisiana, it logically follows that all States are similarly protected, and that the Article 4 inhibition applies to laws taking State territory for purposes of the National Government as well as for purposes of another state. This protection must go to judicial interpretation as well as to acts of Congress. See, generally, *State -vs- Muncie Pulp Co.*, 119 Tenn. 47, 104 SW 437 (1907); and cases involving disputes: *Oklahoma v Texas*, 272 US 21 (1926); *New Mexico v Colorado*, 267 US 30, (1924).

It is for this reason that the State of Florida respectfully excepts from application by the Special Master of the Submerged Lands Act to lop-off the Tortugas Islands from the tip of the Florida Keys, and to otherwise diminish the territorial integrity of the State.

Misapplication of the Submerged Lands Act and the California Doctrine to his approach to issues under consideration here, led the Special Master to error. Exceptions to specific geographical calls and treatment of other areas of Florida's historic boundary follow in Point II.

POINT II

The Specific Findings and Exceptions

1. *Florida's Boundary*

It is appropriate, because of its relevance to every aspect and theory of Florida's case, to first consider Florida's boundary contained in Article I of Florida's 1868 Constitution, which is not only Florida's historic boundary[4], but its only lawful boundary, since it is the last Constitutional boundary provision approved and ratified by Congress, and, as construed by Florida, exceeds three nautical miles in both the Atlantic Ocean and Gulf of Mexico.

The relevant portion of the 1868 Constitutional boundary description is as follows:

> • • • then down the middle of said river [St. Mary's] to the Atlantic Ocean; thence southeastwardly along the coast to the edge of the Gulf Stream; thence southwestwardly along the edge of the Gulf Stream and Florida Reefs to and including the Tortugas Islands; thence northeastwardly to a point three leagues from the mainland; thence northwestwardly three leagues from the land • • •.

A. *Then down the middle of said river to the Atlantic Ocean, thence southeastwardly along the coast to the edge of the Gulf Stream*

"Down the middle of said river" is not ambiguous and the words speak for themselves. However, "To the Atlantic Ocean" is unclear when considered in context with the following call. "Thence southeastwardly along the coast to the edge of the

[4] *U.S. v. Florida*, 363 U.S. 212 (1960).

Gulf Stream" raises several questions. Taking the undisputed fact that the Gulf Stream does not ordinarily touch the coast line[5] of Florida as true, the questions are:

(1) Where along the coast line does one leave the shore to reach the edge of the Gulf Stream to make a southwestwardly turn?

(2) What does "along" mean, i.e., near or by the shore, or on the shore?

(3) Did the drafters of the 1868 Constitution intend for Florida to have a marine boundary in the Atlantic considering what "along" may mean?

(4) What does "southeastwardly" mean in terms of true compass heading?

Florida contends that in construing the boundary provision it should be given a reasonable and logical construction taken as a whole, that is, one call should give meaning to another to clarify the actual words employed by the drafters. Words should not be added or taken away or given other than ordinary meaning.

The Master on page 22 of his report holds "along the Coast" to mean coincident with the coastline and follows the low-water line along the Coast. Accordingly, the Master construes this segment of the boundary as follows:

> "I conclude that a proper application of the Constitutional language requires that the general heading of this final section of the boundary along the low-water mark of the coastline should be followed by the boundary in the same southeastwardly direction until it reaches the 100-fathom line at the western edge of the Gulf Stream."

[5] "Coast line" as used in the text has the same meaning as defined in Title 43 U.S.C. § 1301 (c).

"Along the coast" has no specific meaning standing alone. Ironically, the Master, on page 42, uses the phrase "along the coast of Florida" to mean a belt of marine territory parallel to the coast. Nevertheless, the key to the meaning of "along the coast" lies in the meaning of "to the Atlantic Ocean." Florida's witness[6] gave the phrase its logical and practical meaning. The witness concluded that "to the Atlantic Ocean" meant to the last sea buoy marking the high seas and gave the phrase "along the coast" the meaning of parallel to the coast which, as the Master should agree, is not an unusual meaning.

The witness, a trained and experienced navigator, stated that he considered the 1868 boundary article as a navigator utilizing charts in probable usage in 1868 and testified beginning at TR 306:

> "I will start my construction of the boundary description by making the observation that it is clear one must leave the shoreline to find that point on the Gulf Stream where a turn is made southwestwardly to follow the Gulf Stream and Florida Reefs in the Straits of Florida, because the Gulf Stream never appears from the charts to touch the shores of Florida in the Gulf or Atlantic.
>
> . . .
>
> Keeping this in mind, in construing "down the middle of St. Mary's River to the Atlantic Ocean, "I would proceed to the last ocean bouy at the mouth of the St. Mary's as shown on United States Exhibit No. 7, which bouy appears to be two and one-half to three miles from the mouth of the river.
>
> . . .

[6] Major John D. Adrington.

Proceeding to this point seems logical to a navigator because this point should be cleared to proceed along the coastline. It may be noted that this bouy point approximates the 10 fathom contour.

. . .

Again I might point out proceeding to sea at the mouth of the St. Mary's River is logical because the mouth gives natural access to the ocean and "to the Atlantic Ocean" is the last fix before the call to proceed to the edge of the Gulf Stream.

In other words, the Constitution gives no other instructions as to how to reach the edge of the Gulf Stream by proceeding east or southeast at any subsequent point on the Coast, and the mouth of the St. Mary's River is a natural place to head to sea.

. . .

In construing "thence southeastwardly along the Coast to the edge of the Gulf Stream, "as I stated, I would proceed to the last ocean buoy at the mouth of the St. Mary's River, then turn and follow the 10 fathom contour which parallels the general trend of the coastline in a southeastwardly manner.

In my opinion, the language "along the coastline" suggests a parallel course.

Also, following the 10 fathom contour would allow one to follow general compass headings which are within the allowable limits of the stated heading "southeastwardly."

The headings are acceptable, because, as a navigator, if someone directed me to head southeast, I would head 135 degrees, but if someone directed me to head southeastwardly to a point, I would assume my destination fell somewhere between 112½ degrees and 157½ degrees.

I would follow the 10 fathom contour as shown on U.S. Exhibit No. 10 southeastwardly to the point where the coast of Florida takes a southwestwardly turn and where the 10 fathom contour line and the Gulf Stream appear to the eye to meet. It may be noted this point is perpendicular to the Lake Worth Inlet.

The 10 fathom contour line appears on U.S. Exhibit No. 10 to be a fairly straight line paralleling the coast in a natural fashion much like the Florida Reef line appears on the exhibit in the Straits of Florida.

It is inconceivable that the drafters of the 1868 Constitution would provide for a marine boundary along the entire coast of Florida except for two-thirds of its Atlantic Coastline.

The Master's holding in regard to Florida's Atlantic boundary is contrary to the evidence presented by both parties and is thus an unfounded and arbitrary finding of fact which must be held to be error.

B. *Thence southwestwardly along the edge of the Gulf Stream and Florida Reefs to and including the Tortugas Islands*[*]*; thence northeast to a point 3 leagues from the mainland.*

The Federal Government contends that the call Northeastwardly to a point three leagues from the mainland means to first go East or even Southeast[7] from the Tortugas to the Marquesas then follow the 3-fathom line in a northeastwardly fashion until a point 9 nautical miles from the mainland is

[*] There seems to be no serious conflict between the Parties or the Master as to this portion of the call.

[7] TR 110, 111, and 216

reached.[8] The master agrees that the call commences East or Southeast, but follows a 3-league belt.

The Master construed the call to mean (MR, P. 28):

> . . . It is permissible to infer that the northeastwardly line was itself intended to run three leagues from the Dry Tortugas and the coast of the Keys and the seaward limit of inland waters to a point three leagues from the mainland. . . "

The Master's opinion seemingly rests on three indicia: (1) historic use of shallow waters; (2) compelling language in the 1962 Amendment to the Florida Constitution; (3) three leagues is the only specific Constitutional claim in the Gulf; and (4) forfeiture by Florida because of the 1962 Constitutional Amendment.

The Master's construction is illogical and contrary to the plain meaning of words.

The basis of the Master's contention, taking the evidence as a whole, is that the shallow water area was the area utilized by Floridians in 1868 and the only area Florida would be interested in enclosing within its boundaries.[9]

The actual utilization of Florida Bay in terms of water depths correlated to specific dates in history is unclear and inconclusive by all accounts of the evidence by either party. For example, consider the testimony of Dr. DeVorsey at TR 250:

> Q. In other words, 1870 is not necessarily an accurate date. It could have been several years or even as many as five or six years before that date. Is that possible?

[8] See U.S. Post-Trial Brief at Page 47.
[9] Master's Report, p. 27.

A. Possible.

A better approach than historic private usage for construing the boundary in the area is to determine what was intended to be claimed by the drafters of the 1868 Constitution.

Dr. Tebeau suggests that Floridians of the period were aware of resources in the deeper waters of Florida Bay which they referred to as unexplored or undeveloped areas, and conceivably had an interest in claiming the area (TR 515).

Interestingly, it was stated in *I Kent, Commentaries on American Law 30:*[10]

> "Considering the great extent of the line of the American coasts, we have a right to claim, for fiscal and defensive regulations, a liberal extension of maritime jurisdiction; and it would not be unreasonable, as I apprehend, to assume, for domestic purposes connected with our safety and welfare, the control of the waters on our coasts, though included within lines stretching from quite distant headlands, as, for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that point to the capes of the Delaware, *and from the south cape of Florida to the Mississippi.*" (Emphasis supplied)

A. Yes. "To overcome this difficulty the sponge glass or water telescope was introduced at first with a pane of glass in one end, but afterwards an ordinary wooden pail with a glass bottom substituted for the wood. The device is said to have been employed first about 1870 or a little before and correlated with its use came other changes."

Dr. DeVorsey in reference to the Kent's Commentaries testified at Pages 219 and 220 of the transcript of record:

[10] See Shalowitz, *Shore and Sea Boundary,* Volume One (1962) at 29, fn. 21. The date of publication of the "Commentaries" is 1832, but the Treatise undoubtedly articulate concepts formulated substantially prior to that date.

Q. Do you believe the drafters, as well informed men, may have had knowledge of such rightful claims (to a closing line from South Cape of Florida to the Mississippi)?

A. This is possible. Some of them were attorneys.

Q. Do you think it absurd that they would attempt to enclose Florida Bay by a 45 degree line from the Dry Tortugas to the mainland?

A. I do not think it was absurd.

It is not unusual for a coastal sovereign to claim marine territory prior to actual usage which depends on technological capability. For example, in 1945 President Truman by executive proclamation claimed the resources of the vast Continental Shelf for the Federal Government and Congress provided for the administration of those resources by virtue of the Outer Continental Shelf Lands Act of 1953.[11] However, the Federal Government is not exploring the entire Continental Shelf nor does the state of technology permit exploration at this moment, 29 years after Truman's proclamation of claim.

The best way to construe, indeed, if construction is required, "Northeastwardly to a point" is to consider such language standing alone and its implication.

In considering "thence northeastwardly to a point three leagues from the mainland" the call must be considered an absolute heading of 045 degrees east, because there are no geographical directions included in the call to be followed. Unlike any other call included in the boundary description under consideration, the "northeastwardly" call is not modified in course or direction by additional language.

[11] See fn. 43 infra.

The Master in the application of "usage" in his construction of "northeastwardly to a point three leagues from the mainland" for his contention that a three league belt should be initially followed southeastwardly from the Tortugas, arbitrarily *adds* a geographical call where none existed to predominate over an otherwise unambiguous compass heading.

This Court in *M'Iver's Lessee v. Walker,* 4 Wheat (U.S.) 444, (1819) held that if there is nothing in the description of a boundary to control the call course and distance, the course must be determined according to magnetic meridians. Several states in construing the meaning of generalized courses have held that specific meridians should be followed. For example, the Supreme Court of California in the case of *Currier v. Nelson,* 96 Cal. 505, 31 P. 531 (1892), considering the term "northerly" in a grant without specific or further suggestion as to whether an east or west course be followed construed the term to mean due north. The Supreme Court of Vermont in *Sowles v. Minor,* 82 Vt. 344, 73 A. 1025 (1909), held that the expression "southerly" or "south" used in fixing a definite course so many degrees west must read "south" where the call is not otherwise controlled by an ascertained monument.

There is no ascertained monument in the call under consideration and the Master erred in supplying a geographical description to create an ambiguity.

The Federal Government in its Brief[12] refers to a Report of the Honorable Albert B. Maris, Special Master in *Michigan v. Ohio,* No. 30 Original, June 30, 1971.

It appears from the Brief's Report of the case that Michigan argued that "the statutory term 'northeast' should be construed to mean in a northeasterly direction, that is, the bearing of a line running to a point somewhere between north and east."

[12] Pages 58-60.

According to the Brief, the Special Master was not convinced, reasoning that "such a bearing would be so indefinite as to be impossible to follow unless a terminal monument at its northeasterly end was so specified in the statute." The Master concluded that the term "northeast" must therefore be interpreted as North 45 degrees East.

The Master was imminently correct, and *Michigan v. Ohio* is, conversely, authority for the instant matter, in that the term "Northeastwardly" standing alone without further reference to geographical locations, either as commencing midpoint or terminal monuments, must be construed to mean Northeast or North 45 degrees East to give the call sufficient definiteness to constitute a boundary.

Dr. DeVorsey, the witness for the Plaintiff agrees at Pages 253 and 254 of the Transcript of Testimony:

Q. If I told you to go Northeastwardly, would you go North?

A. No,

Q. Would you go East?

A. No.

Q. Would you go some direction between those two points?

A. Yes.

• • •

A. I would go somewhere midway between the two, between North and East.

Q. What would that be in a modern compass heading?

A. That would be 45 degrees.

The Master on page 28 of his Report concludes that the 1962 Amendment to the 1885 Constitutional boundary coincides with his interpretation of the Northeastwardly call.

The Master concludes the call in the 1962 Constitutional Amendment which states in reference to the Tortugas "thence Northeastwardly, three leagues distant from the coast line to a point three leagues distant from the coast line of the mainland" is a boundary intended to include only water area within three leagues of land on the Northern side of the Keys. Yet its authors still used the term "northeastwardly" to define the boundary! The Master's conclusion is, at best, inconsistent.

The language clearly means to start three leagues from the coast line of the Tortugas on a northeastwardly course to a point three leagues from the mainland. Any other meaning of the call requires utter disregard for the word "northeastwardly," which is not sound construction.

Moreover, following the Master's call requires one to proceed in "northeastwardly" not at all. Rather, it is necessary that one follow a "southeastwardly" direction from the Tortugas. This defines every rule of construction, requiring that one substitute words of opposing meaning for the definite term used in the Constitutional boundary description.[13]

2. *FLORIDA's HISTORIC BOUNDARY WAS NOT LIMITED BY THE 1962 AMENDMENT TO THE 1885 CONSTITUTION OF FLORIDA.*

The Master contends that if Florida is correct in its contention that Congressional approval of its 1868 Constitution approved Florida's historic rights in the area defined by the

[13] Application of the California Doctrine.

boundary described therein, then Florida forfeited such rights by the 1962 amendment to its 1885 Constitution, which included a different boundary description. (MR 17, 28-29).

Florida disagrees that the 1962 amendment attempted to change, or was intended to modify, Florida boundaries in the Gulf, but was merely a restatement of the Gulf boundaries. In the Atlantic, however, the 1962 amendment reduced Florida's boundary,[14] for which there was no Congressional authority.

Only the boundary contained in the 1868 Constitution has been approved by Congress and only Congress has the power to create states [15] including the extension or reduction of the geographical area of a state once created.[16] This point is made very clear in Section 4 of the Submerged Lands Act where Congress grants to the states permissive authority to extend their seaward boundaries to a line three geographical miles distance from the coast.

Since Section 4 only relates to extending manifest boundaries, the 1962 Amendment, if it had the effect of reducing Florida's boundary, which Florida denies, was a unilateral alteration of the state's boundary, and that alteration has not been recognized or approved by Congress. Therefore, the 1868 boundary redescribed in Florida's 1968 Constitution, continues as the only hsitoric and lawful boundary of the State.

[14] In 1953 the Florida Legislature enacted into law Chapter 29744, Laws of Florida, 1953, stating by preamble that the 1885 Constitutional boundary was "indefinite and not clearly defined" and therefore the Coast line of Florida adjacent to the atlantic Ocean would be constitutionally interpreted as being three geographic miles distance from the Coast line. To the extent the statute attempted to alter the Constitutional boundary in any way, it was unconstitutional boundary even under auspices of the Sumerged Lands Act.

[15] Article IV, Section 3, U.S. Constitution.

[16] The only possible exception to this Congressional power is natural accretion to or reliction of state soverignty lands.

(It must be remembered that Section 4 of the Submerged Lands Act provides for states to extend their boundaries without prejudice to their claim, if any they have, that their boundaries extend beyond three miles.)

The Master's opinion as to the effect of the 1962 Constitutional Amendment prejudiced Florida's historic claim. This application violated terms of and intent of the Act. The Master erred in construing Florida's boundary with reference to the Amendment.

Nevertheless, the Master, through error, finds the Amendment reduced Florida's claim of a boundary north 045 degrees east from the Tortugas to the Mainland (MR, p. 28), and that such reduction must be treated as abandonment (MR, p. 29). The Master must be reversed.

The Complainant cited six cases on Page 33 of its Post-Trial Brief for the proposition that states have authority to cede their jurisdiction to the United States, and acceptance of the National Government is presumed. The Master apparently agrees on Page 28 and 29 of his Report, but without reference to authority. A review of the cases cited indicate that not one is on point or even analogous authority for the position of the Plaintiff. For example, the United States quotes from and relies on *Peterson v. U.S.*[17] The facts in *Peterson* are that in 1940 Congress dedicated and set apart a public park in California. California by specific act ceded exclusive police power jurisdiction of the dedicated area to the Federal Government. The Court held that states could cede such jurisdiction to the Federal Government, but it is clear from the language of the opinion that California's boundary was not diminished by the grant:

[17] 191 F.2d 154 (1951).

> . . . it has been recognized that the ability of the States and the National Government to cooperatively adjust jurisdcition over territory *within their borders* furthers the mutual interest of the people of both states and nations . . . (Emphasis supplied) 191 F. 2d at 157.

In summary, the 1962 Amendment was ineffectual if it is interpreted as an attempt to diminish the hsitoric boundaries of Florida. Accordingly, the amendment being ineffectual for its designed purpose it is ineffectual for all purposes and secession of jurisdiction should not be attributed to so futile an act.

The Court should find on this point, because of its impact on Florida's contention, that Florida is not obliged to rely on the Submerged Lands Act for its claim to submerged lands within its congressionally approved boundary, and the Court should recognize the significance of the ancient boundary in the Gulf of Mexico as it relates to the historic status of Florida Bay. If, however, the Court decides against Florida on the two issues just stated, then a ruling here is meaningless.

4. *FLORIDA'S HISTORICAL INLAND WATER CLAIM*

The Master finds that Florida Bay[18] is not an historic bay principally because Florida failed to carry a burden of proof which is "clear beyond doubt", [MR, p. 46]. The Master abused his discretion by determining Florida's burden of proof was more than a preponderance. Furthermore, the Master's finding in regard to Florida Bay is contrary to the weight of evidence even if Florida must prove its case clear

[18] Florida Bay is construed by the State of Florida to be all waters bounded on the South by the Florida Keys to and including the Dry Tortugas Islands, on the Northeast by the lorida eninsula and on the Northwtst by a line running 045° from the Tortugas Islands to ape Romano.

beyond doubt. He ignored evidence supporting Florida's case, clearly misconstrued evidence considered in his report, and erred in his conclusion of law relative to the criteria required to establish historic title, all of which will be hereafter shown.

A. *Concept of Historic Waters*

Florida claims that Florida Bay is a historic bay or historic waters; thus, inland waters of the State of Florida.

The Convention on the Territorial Sea and the Contiguous Zone[19] provides that waters landward of baselines enclosing bays, including historic bays, shall be considered internal waters.[20] However, historic bays are not defined in the Convention; thus, the U. S. Supreme Court has recognized that the term must therefore derive its content from general principles of international law stating:

> There is no universal accord on the exact meaning of historic waters . . . There is substantial agreement, however, on the outlines of the doctrine and in the type of showing which a coastal nation must make in order to establish a claim to historic inland waters.[21]

The leading modern case on the nature, characteristics and significance of historic waters is *United Kingdom v. Norway*[22] better known as the Fisheries Case, and referred to as such hereafter. Under the authority of *The Paquete Habana*,[23] the Fisheries Case is the law of the case, the Court having said:

[19] Adopted April 27, 1958 (U.N. Doc A/Conf. 13/L.52) and ratified by the United States on March 24, 1961. See 15 U.S.T. (Pt. 2) 1606.

[20] Florida and the United States have stipulated that the determination of the coast line not otherwise agreed upon shall be governed by pertinent articles of the Convention. See Joint Pre-Hearing Statement dated September 1971 excuted by Ervin N. Griswold, Solicitor General of the United States and Robert L. Shevin, Attorney General of the State of Florida.

[21] *U.S. v. Louisiana* 394 U.S. 11 at 74-75 (1969).

[22] (1951) International Court of Justice, Rep. 116.

[23] 175 U.S. 677 (1899).

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjcets of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. *Hilton v. Guyot*, 159 U.S. 113, 163, 164, 214, 215.

In the Fisheries Case of 1951, the International Court of Justice considered the concept of historic waters. The Court gave the following definition: ". . . . 'historic waters' are usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of an historic titie."[24] Historic title has been traditionally claimed in respect of certain bays; however, the theory does not apply to bays only but is more general in scope.[25] In fact, a second memorandum[26] on historic waters prepared by the United Nations Secretariat published in 1962 stated in conclusion at paragraph 183:

> In the first place, while "historic bays" present the classic example of historic title to maritime areas, there seems to be no doubt that, in principle, a historic title may exist also to other waters than bays, such as straits or archi-

[24] (1951), International Court of Justice, Rep. 130.

[25] See Memorandum prepared by the UN Secretariat on Historic Bays: Doc. A/Conf. 13/1 (1957), Page 2.

[26] Juridical Regime of Historic Waters, Including Historic Bays: UN Doc. A/CN. 4/143 (1962).

pelagoes, or in general to all those waters which can form part of the maritime domain of a state.

The doctrine of historic waters serves as a fundamental rule of international law,[27] and serves as a protective measure for those states having large bays closely linked with the land and traditionally considered by those states as part of their territory. Logically, this is so because of vital importance to economic growth and national security of the subject states.

The concept of historic waters however should not be considered a regime of exception to the general rules of law relating to delimitation of the maritime domain of a state.

In a study on historic bays, Bourguin developed this line of thought:[28]

> If it is agreed that the solution given by ordinary law to the problem of the territoriality of bays is not a matter of a mathematical limitation of their width but depends on an appreciation of the various elements that make up the character of the particular bay, the notion of "historic titles" assumes a meaning that is quite different from that given it by those who favour the ten-mile rule. *"Historic title" no longer has the function of making an otherwise illegal situation legitimate. It is no longer a means whereby the coastal State can include a part of the high seas in its domain. It is no longer connected with the idea of usucaption. It is one element along with others characterizing a particular state of affairs, whcih must be considered as a whole and its various aspects.* (Emphasis Supplied)

The authors of the latest United Nations Treatise on historic

[27] See Arts. 7 and 12, Convention on Territorial Sea and Continguous Zone; Also see "Fisheries" Case.

[28] Bourguin "Les Baies Historiques" in Me'langes Georges Sauser-Hall (1952) quoted in UN Doc. A/CN. 4/143 at Page 25 (U.S. Ex. 100).

waters seem to agree that historic title is not an exception to the general rules of international law:[29]

> . . . it may be pointed out that there seems to be certain difficulties inherent in the view that title to "historic waters" is an exception to the general rules of international law regarding the delimitation of the maritime domain of the State and that such title therefore must be based on some form of acquiescence on the part of the other States. If such general rules exist and whatever their contents may be, they must obviously be customary rules. When the Geneva Convention on the Territorial Sea and the Contiguous Zone comes into force and is widely ratified, this situation will change to a certain extent. For the present, however, the general rules in this field from which the regime of "historic waters" would be an exception could only be customary rules. This means that both the general rules and the title to "historic waters" would be based on usage. Why then should the latter be considered as exceptional and also inferior with regard to its validity, so that the acquiescence of the other States would be necessary to validate the title? The facts on which the title to "historic waters" are based belong to the usage in this field, no less than the facts on which the general customary rules would be based. And the *opinio juris* exists in the case of "historic waters" just as much as in the case of the so-called general rules.

It has been pointed out that there are certain common features between the concept of historic waters or historic rights in general on the one hand, and the concepts of custom, prescription, and occupation, on the other.[30] All such concepts presume that the resulting rights and titles have been

[29] Juridical Regime of Historic Waters, Including Historic Bays, Supra fn. 26.

[30] See MacGibbon, 'Customary International Law and Acquiescence' (1957), 33 Brit. Yearbook Int'l Law 114, at 119-21. Also see U.N. Doc. A/CN. 4/143 at 31-34.

preceded by two elements; a constant practice or exercise of state authority, and a toleration or acquiescence on the part of other states, particularly those directly concerned or affected by the practice in question. However, as properly pointed out by Norway in the Fisheries Case, the common features and process of development must not be exaggerated, for this could have important consequences on the burden of proof. For instance, acquisitive prescription generally gives the impression that there must be some adverse holding on the part of the claimant. This can hardly be the case when a state claims to have an historic title to a water area. Indeed, it is somewhat incompatible with the idea that the exercise of authority by the claimant state must have been peaceful. Perhaps there is more affinity between the concept of historic waters and that of occupation as a means of acquiring title.

As is well known, occupation is an original mode of acquisition of territory. It is defined by Oppenheim as follows:

> Occupation is the act of appropriation by a State by which it intentionally acquires sovereignty over such territory as is at the time not under the severeignty of another State.[31]

A similar definition is given by Fauchille:

> Generally speaking, occupation is the taking by a State, with the intention of acting as the owner, of something which does not belong to any other State but which is susceptible of sovereignty.[32]

It is the contention of Florida that its claim of historic title is based on occupation of Florida Bay.

[31] Oppenheim, *International Law*, Volume 1, 8th ed. (1955), page 555. Also see U.N. Doc. A/CN. 4/143 at 31-34.

[32] Fauchille, *Traite de droit international public*, Tome 1er, 2e Partie, 8e (1925), pages 680-681. Also See U.N. Doc. A/CN. 4/143 at 31-34.

It is fairly well established that historic waters have the status of internal waters. As for the 1958 Territorial Sea Convention, it does not expressly state that historic waters have the status of internal waters but it does provide that the waters enclosed in a bay shall be considered as internal waters[33] and that waters claimed by "historic title" may affect the delimitation of the territorial seas between opposite or adjacent Coast.[34] Furthermore, in the Fisheries Case, the Court held specifically that the waters of the Vestford can only be regarded as internal waters.[35]

The Federal Government does not challenge the concept of historic waters or that such waters are internal. Indeed it would be estopped to do so, for at the 1930 Conference on the Codification of International Law the United States delegation submitted:

> Waters, whether called bays, sounds, straits, or by some other name which have been under the jurisdiction of the Coastal State as part of its interior waters, are deemed to continue a part thereof.[36]

B. *Florida Bay*

In this portion of its Brief, Florida will relate its evidence to the foregoing statements of law to show Florida possesses historic title to Florida Bay under international law as either a historic bay or historic waters.

Florida Bay is a triangular-shaped bay bordered on the south by the Florida Keys from Key Largo to the Dry Tortugas which historically appear to be a solid land mass (TR 351) attached to the mainland and now connected to the

[33] Article 7, paragraph 4.
[34] Article 12, paragraph 1.
[35] (1951), International Court of Justice, Rep. 142.
[36] Ser. L.O.N.P. 1930, V. 16, Page 107, Quoted in U.N. Doc. A/Conf. 13/1, at 37.

mainland by U.S. Highway No. 1.[37] The Bay is bordered on the west by Florida's historical constitutional boundary which is a 045 degree line from the Tortugas to three leagues from the mainland. The Bay is bordered on the north by the mainland of Florida.

For Florida Bay to be considered a historic bay, the Dry Tortugas must be considered islands forming a multiple-mouth bay and the archipelago known ast he Florida Keys must form one side of the bay, which is lawfully conceptual.[38] Nevertheless, it is not necessary in the determination of Florida's historic title to determine Florida Bay has the geographical characteristics of a bay since "historic waters" is an internationally accepted and unchallenged concept on which to base such title.

Florida Bay is historically a part of Florida. It has had a series of names, and its boundaries were never exactly delineated until the Florida Constitution of 1868, but those boundaries were well established by usage before that time.[39]

Florida has presented in evidence a series of ancient maps and charts to demonstrate a remarkable continuity of Florida Bay by whatever name as a distinctive area with roughly the same boundaries through Spanish, British and American experiences. (TR 415)

The first map presented by Florida is the Jeffery's map of 1763 whch shows Richmond Bay and Chatam Bay as the

[37] U. S. Highway No. 1 stretches from Jewfish Creek to Key West, a distance of 107.6 miles and crosses 63 Keys connected by 42 bridges, none of which span a channel sufficient for navigation by ocean-going vessels with a draft greater than 25 feet. (Florida Exhibit 164, TR 221).

[38] *U. S. v. Louisiana*, 394 U.S. 1 at 60-73. See UN document A/Conf. 13/1 Historic Bays at Page 7 where the Zuyder Zee in Holland is listed in examples of historic bays. The Zuyder Zee is connected by a continuous fringe of islands separated by narrow passages.

[39] TR 414.

designation given the area. The first map to use the designation Florida Bay was the Bache map published in 1854.

Louis Agassiz, a famed Swiss naturalist, commenting on the Bache Survey stated:

> South of the main land, between it and the range of keys, there are extensive flats, which, even at high water, are but slightly covered, and which the retreat of the tide lays bare, leaving only narrow and shallow channels between the dry flats, with occasional depressions of greater depth.
>
> • • •
>
> These mud flats extent not only between the main land and the keys as far as Cape Sable, but may be traced to the north along the western shores of the continuent, and to the west along the northern shores of the keys, not only as far as Key West and the Marquesas, but even to the Tortugas. (See Page 146, Fla. Ex. 47)

For a period of time the area was known as "Bay of Florida."[40] However, Florida Bay is the contemporary designation of the area. The important point, however, is that from the 1760's to now the area has been an identifiable area known to mapmakers, surveyors and explorers of many nations as a bay by one name or another. Even the Federal Government recognizes the area by the name of Florida Bay.[41] It seems only the dimensions, and its *de jure* status are in dispute.

Florida, along with Florida Bay, were first possessed by Spain, then England, and again by Spain; but it was not until Florida became a part of the United States in 1821 that public acts of dominion became significant in the area known as Florida Bay.

[40] See Florida Exhibits 55 and 56.
[41] U. S. Ex. 54; TR 144; U.S. Post-Trial Brief at 68.

The United States acquired title to Florida from Spain by virtue of the Treaty of Amity, Settlement and Limits. Article 2 provides for the King of Spain to cede to the United States:

> . . . in full property and sovereignty, all the territories which belong to him, situated to the eastward of the Mississippi, known by the name of East and West Florida. The adjacent islands dependent on said provinces which relate directly to the property and sovereignty of said provinces . . . .[42]

It is clear that the Treaty would include the Dry Tortugas and the water area between the Islands and the mainland, i.e. Florida Bay.

As early as March, 1822, acting Florida Governor W. D. Worthington informed Secretary of State John Quincy Adams of Florida's concern about foreign fishermen fishing in waters off Florida's coast. (TR 368). Reacting to Worthington's communication, Congress on December 20, 1823, on Motion of Florida's Territorial Representative Richard Keith Call, called on the Committee on Commerce to inquire into the expediency of excluding foreign fishermen from the waters adjacent to the coast of Florida.[43]

By 1825 and thereafter, Federal revenue cutters were patrolling the southwest coast of Florida (TR 369) and arresting foreign turtlers.[44]

The British government through its consulate in New York City on August 9, 1831, requested the United States government for permission to allow English fishermen to fish in Florida waters. (TR 371)

[42] Florida Ex. 71 at 4 and 5.
[43] Florida Ex. 73.
[44] TR 371 and Florida Ex. 74.

Recognizing the special interest of territorial Florida, the State Department, upon the advice of President Jackson, wrote territorial Governor William P. Duval at Tallahassee on August 25, 1831, informing him of the British request (TR 372).

Governor Duval on October 7, 1831, wrote the Secretary of State advising him of the importance of fishing and turtling to Florida and stated generally his opposition to the British request concluding that if the President granted the request as a "courtesy" to the British government that the grant be conditioned on laws to be enacted by the territorial legislature.[45]

The waters referred to by Governor Duval were the sounds, bays and waters contiguous to and between the Islands and Keys and in shallow waters while he made no specific reference to the area of Florida Bay,[46] the size of ships being used were "twenty to fifty tons burdened"[47] which would imply the employment of deep water such as found at the northwest section of Florida Bay.

From what is known from the record about the fishing and turtling practices of the area, it is reasonable to conclude that some portion, if not all of Florida Bay, was considered in Governor Duval's response to the British request.

In consideration of the British request, the territorial legislature conducted an inquiry into the matter of foreign fishing activities in Florida waters. The Committee on the State of the Territory on February 8, 1832, after making its report, passed a resolution seeking Congress to sanction an act entitled "An Act for the Protestation of the Fishing on the Coast of Florida to Raise a Revenue therefrom."[48]

[45] Florida Ex. 75 at 562, 563.
[46] Ibid., at 559.
[47] Ibid., at 558.
[48] Florida Ex. 76 at 6.

The Committee Report stated:

> It has been urged that the law of nations would not justify the appropriation of the fisheries to ourselves exclusively. The Committee would remark, that the British Government had admitted our right to do so, by asking for the use of these fisheries as a favor.[49]

This statement is particularly significant in view of the fact that the Committee understood the law of nations provided for a state's proprietary interest in marine areas such as "little bays" and "gulphs" to extend to three leagues of the shore.[50]

If the Committee did not believe the law of nations would justify appropriation of the fisheries in question exclusively for Florida when the Committee was of the opinion the law of nations provided for a three-league territorial sea, obviously the Committee had a bay or gulf in mind in excess of such distance, undoubtedly Florida Bay.

As stated above, the territorial legislature in 1832 passed Florida's first fisheries law. The Act prohibited any person from taking any fish or turtles on the coast or in any of the seas, bays, creeks, and harbors of the territory without a license.[51]

Congress failed to affirm Florida's fisheries act, but also failed to grant the British permission to fish in the area.

In March, 1845, Florida entered the Union and in December, 1845, the State of Florida passed an act for the protec-

[49] Ibid., at 4.
[50] Ibid.
[51] Florida Ex. 77 at 375-378.

tion of the fisheries on the coast of Florida prohibiting non-residents from taking fish in Florida waters without a license.[52] Florida waters were and are embraced within the territories of east and west Florida ceded to the United States by the Treaty of Amity, Settlement and Limits with Spain.[53]

Historically, Florida Bay has been considered a strategic military area. The Secretary of War reported to Congress in January, 1844, the desirability of fortifying Key West and the Dry Tortugas (TR 387). The Secretary's report was based in large part upon communications received from General Thomas S. Jesup, Quartermaster General of the United States (TR 387, Fla. Ex. 92).

Jesup, stated in the communication:

> Key West, the Dry Tortugas, and Key Biscayne, are the great strategic points on our Southern frontier; they should be strongly fortified. Combined with proper naval means, they would command completely the northern entrance into the Gulf of Mexico, and offered better protection to the Commerce of the whole West and Southwest, than ten times the force in Florida at any other points, or in any other way. (TR 388)

On June 14, 1844, Congress appropriated funds for fortification of the Key West-Dry Tortugas military complex.[54] Once the decision was made to develop the complex, it was necessary to secure clear title to the necessary land and water area. Accordingly, a plat map of the southern portion of Florida was presented to the War Department with a request that the Department designate on the map "by a distinct

[52] This Act was repealed in 1861 and a bill was enacted restricting fishing in Florida waters to others than Florida citizens.
in Florida waters to others than Florida citizens. See Fla. Ex. 84.

[53] Florida Ex. 19, an act for the admission of the States of Iowa and Florida into the Union, 5 Stat. 742-743 (1885).

[54] Florida Ex. 95.

color, the extent of the reservation desired." (TR 389). The map was then to be sent to the White House so that President Polk could issue an executive order establishing the Reservation.[55]

On September 12, 1845, the War Department requested that "all the Islands, Keys and Banks, comprising the group called the Dry Tortugas, with other Islands, or Keys on the Florida coast embraced within the red lines on the enclosed diagram, may be reserved from sale of any kind, till a survey which has been ordered shall have been made, with a view of determining their military relations and properties." State of Florida Exhibit No. 97.

On September 17, 1845, President Polk issued his official order temporarily reserving for military purposes the area included in the line shown on Florida Exhibit 98.

Florida was not adverse to making the land necessary for the complex available. The Florida Legislature, on July 8, 1845, enacted a law "consenting to the purchase of the United States of land for the erection thereon of fortifications and defensive works, and ceding to the United States title and jurisdiction over the same." (TR 390)

The State specifically spelled out, however, that in relinquishing jurisdiction, it was "provided always, and the secession and consent aforesaid, are to be granted upon the specific conditions that this Commonwealth shall retain a concurrent jurisdiction." State of Florida Exhibit 99.

It is obvious that Florida from public acts committed from territorial existence to this moment has persistently protected the economic resources of its waters. For example, in 1893 state statutes were passed prohibiting persons who were not citizens of the United States from taking fish from Florida waters without a license.[56]

[55] Florida Ex. 96.
[56] Florida Ex. 123.

In 1915 the state enacted laws which again insisted that "all fish in the rivers, bayous, lagoons, lakes, bays, sounds and inlets bordering on or connected with the Gulf of Mexico and the Atlantic Ocean, or in the Gulf of Mexico or Atlantic Ocean, within the jurisdiction of the State of Florida, are hereby declared . . . the property of the State of Florida."[72]

Florida since 1957 has absolutely prohibited shrimping by any person whether foreign or national in the Tortugas shrimp beds by virtue of Chapter 57-358, Laws of Florida, 1957.[58] The 1957 Act wa amended in 1961 by Chapter 61-470, Laws of Florida, 1961 to redefine the Tortugas shrimp beds and to creater an additional area. A later amendment, Chapter 70-162, Laws of Florida, 1970,[60] redefined the Tortugas shrimp beds as they exist today.

Clearly, legislation creating the Tortugas shrimp beds and asserting the state's police power therein is a significant act of state dominion over a substantial part of the area known as Florida Bay.

In addition to the police power asserted and referred to above, Florida in 1968 enacted into law the "Florida Territorial Waters Act" which codified as Section 370.21, Florida Statutes:

> 370.21 Florida territorial waters act; alien-owned commercial fishing vessels; prohibited acts; enforcement.—(1) This act may be known and cited as the Florida territorial waters act.
>
> (2) It is the purpose of this act to exercise and exert full sovereignty and control of the territorial waters of the state.

[57] Florida Ex. 124.
[58] Florida Ex. 125.
[59] Ibid.
[60] Florida Ex. 125

(3) No license shall be issued by the division of marine resources of the department of natural resources under §370.06, to any vessel owned in whole or in part by any alien power, which subscribes to the doctrine of international communism, or any subject or national thereof, who subscribes to the doctrine of international communism, or any individual who subscribes to the doctrine of international communism, or who shall have signed a treaty of trade, friendship and alliance or a nonaggression pact with any communist power. The division shall grant or withhold said licenses where other alien vessels are involved on the basis of reciprocity and retorsion, unless the nation concerned shall be designated as a friendly ally or neutral by a formal suggestion transmitted to the governor of Florida by the secretary of the state of the United States. Upon the receipt of such suggestion, licenses shall be granted under §370.06, without regard to reciprocity and retorsion, to vessels of such nations.

(4) It is unlawful for any unlicensed alien vessel to take by any means whatsoever, attempt to take, or having so taken to possess, any natural resource or the state's territorial waters, as such waters are described by Art. II of the state constitution.

In the enforcement of the territorial waters act, Florida has asserted jurisdiction over the entire area herein defined as Florida Bay (TR 437-438).

In regard to the attitude of foreign governments to Florida Bay, Mr. Randolph Hodges, Executive Director of the Department of Natural Resources since 1961, testified as follows:

Q. Mr. Hodges, from your actual knowledge as Executive Director of the Department of Natural Resources

for the State of Florida or from the official records of that Department, can you state whether or not the laws and regulations to which you have testified have ever been challenged by a foreign nation?

A. Florida's marine conservation laws, including its Territorial Waters Act, have not been challenged by a foreign nation or citizen of a foreign nation or citizen of a foreign country, to my knowledge; although foreign nations and their citizens are subject to the rules and laws imposed by Florida Statutes, in regard to protection of Florida's natural resources. I might add, it has not been necessary to exclude foreign nations or foreign vessels from Florida territorial waters except in two instances where Cuban fishing vessels were arrested by the Marine Patrol within three leagues of land.

The reason it has not been necessary to exclude foreign vessels is such vessels are never sighted by the Department's marine patrol although the patrol is very active in the Florida Bay area.

In regard to the vital interest of Florida Bay to Florida, Mr. Hodges testified as follows:

Q. Mr. Hodges, what would be the impact if a court decided that Florida couldn't police shrimping in the Tortugas areas?

A. It would just about wipe out the shrimping industry in Florida, which is a 16-million-dollar-a year industry here. Over fifty percent of the shrimp taken in waters off Florida are spawned in the Tortugas shrimp bed area. If there is no control over shrimping in that area, it will be over-fished and completely depleted. If the shrimp aren't allowed to spawn and grow to maturity, there won't be any left in other waters to be caught.

Mr. Hodges further stated that Cuban vessels, but vessels of no other country have appeared in Florida territorial waters (TR 561-568). These vessels were apparently within an area that even the Federal government would consider territorial seas of Florida (TR 561). However, Florida in its discretion and out of deference to the international situation of the past several years refrained from asserting its police power and relied on Federal authorities under the circumstances.

The best evidence of Florida's willingness to assert her sovereignty in Florida Bay comes from pleading of the United States filed in a presently pending action in the United States District Court, Northern District of Florida.[61] Quoting from the Complaint:

> 1. That certain Cuban fishing boats have been and are engaged in fishing for shrimp in the waters of the Gulf of Mexico in the vicinity of 25.03° north latitude, 82.22° west longitude, more than twelve geographical miles from any part of the coastline of the State of Florida or of the United States, between Cape Romano and the Dry Tortugas.
>
> . . .
>
> 3. That the State of Florida asserts a right to regulate or prohibit fishing in said waters, and immediately threatens to arrest the foreign fishing boats fishing for shrimp therein.

The State of Florida, Board of Trustees of the Internal Improvement Trust Fund which under Florida Statutes holds title to all lands owned by the State by right of its sovereignty and are responsible for administering and protecting those lands (TR 419), on October 4, 1941, leased 3,013,406 acres of submerged land in Florida Bay to private individuals and

[61] *U.S. v. Florida*, Tallahassee Civil Acion No. 1672.

corporations concernel with oil exploration.[62] Actual exploration was conducted in the lease area with at least one deep well of 15,000 feet in depth drilled. This lease eventually expired in 1964 (TR 427).

In summary, beginning in 1941, and continuing for at least 33 years, the State of Florida leased the submerged lands in Florida Bay.

Individuals and corporations thought enough of Florida's title of ownership in Florida Bay to pay considerable sums of money for surveys, drilling and exploration for minerals under such submerged lands. The leasing of Florida Bay was a public act, and no foreign government challenged Florida's right to lease the submerged lands of Florida Bay until the instant litigation.

It is clear from a review of Florida's Exhibits 129, 167 and 168 that the Board of Trustees of the Internal Improvement Trust Fund, which statutorially owns and protects Florida's sovereign lands considered the northwest perimeter of Florida Bay to be a 045° line from the Tortugas to the mainland. The Trustees are the same constitutional officers which comprise the State of Florida, Department of Natural Resources.

Perhaps the most significant aspect of this case in determining the attitude of foreign governments to Florida's claim to historic title in Florida Bay is the absolute absence of any evidence or hint of evidence from the Federal Government that any country has in the past 150 years protested or objected to Florida's overt, active assertion to sovereign claim to Florida Bay.

Highly significant in regard to assertion of sovereignty of Florida Bay is the act of the United States Congress in affirming to the world in 1868 that Florida, one of the States of the Union, had a marine boundary from the Dry Tortugas Islands

[62] Florida Ex. 127, (TR 420).

to the mainland which formed the northwest perimeter of the Bay.

Florida contends that the 1868 Act was a significant act in terms of international consequences because no one in the world considered a national or state boundary to encompass an area of less dignity than sovereign, imperium and dominium, until the Supreme Court's decision in *U.S. v. California*[53] which has no binding effect on international attitudes.

It is not only lawful that Florida has asserted her sovereignty in Florida Bay under the 1868 Constitution, but it is also appropriate, for the Supreme Court as late as this year in *Askew v. American Waterways Operators Inc.* cited with approval *Manchester v. Massachusetts*, 139 U.S. 240, 266, where the Court stated that if Congress fails to assume control of fisheries in a bay, "the right to control such fisheries must remain with the State which contains such bays."

5. *THE BOUNDARY BETWEEN THE ATLANTIC OCEAN AND THE GULF OF MEXICO IS AT LATITUDE 25° 40′ NORTH*

As it uniquely relates to Florida, a determination of rights under the Submerged Lands Act mandates a determination of the demarcation between the Gulf of Mexico and the Atlantic Ocean. Thus, assuming, Arguendo, the Federal Government's contentions as supported by the Master's findings are correct of that Florida is limited to three geographic miles in the Atlantic and to three leagues in the Gulf of Mexico, it is imperative to the resolution of the case to determine what portion of Florida's coast line is adjacent to the Gulf and what portion is adjacent to the Atlantic.

The Submerged Lands Act repeatedly refers to the Atlantic and Gulf in several subsections of 43 U.S.C., Section 1301,

[53] 332 U.S. 19 (1947).

but no section in the act defines the location of these geographical areas; consequently, external sources are required to give meaning to the act.

Florida contends the boundary between the two bodies of waters is latitude 25°40′ North, the position of Cape Florida, which means the Florida Keys and Straits of Florida Southwesterly of said latitude are located in the Gulf of Mexico.[64]

The Federal Government contends the boundary between the two bodies of water is a line North from Cuba along the 83rd meridian to the latitude of the South point of the Dry Tortugas (24°35′N.), along this parallel eastward to Rebecca Shoal (82°35′W.), thence through the Shoals and along the Florida Keys to the mainland.[65]

The Master adopts the position of the Federal Government located where it is understood to exist by "geologists, mariners, on the premise that the Gulf of Mexico should be conceptually explorers and historians." We agree. Nevertheless, the Master, as will be shown, abused his discretion by ignoring overwhelming evidence which is contrary to his finding, to approve a definition of the Gulf presented from one unsupported source and negated by that source itself.

The Federal Government takes its description, adopted by the Master, of the Gulf from the International Hydrographic Bureau's Special Publication No. 23 entitled *Limits of Oceans and Seas.*[66] For proof of its contention in this regard, Plaintiff primarily relies on the existence of the document which contains the definition; however, the document on its face[67] states, "these limits have no political significance whatsoever."

[64] Florida's contention is based on the conclusion of Dr. Robert N. Ginsburg at TR 294.

[65] Post-Trial Brief of U.S. at 73-74.

[66] Florida Exhibit No. 7.

[67] Preface to Third Edition.

Just as importantly, in the same preface the authors relate that the document is "not to be regarded as representing the result of full geographic study; the bathymetric results of various oceanographic expeditions have however been taken into consideration so far as possible, and it is therefore hoped that these delimitations will also prove acceptable to oceanographers." The authors make it quite clear that the delimitations are primarily for uniformity in dealing with areas in various publications, and indicate geographc and bathymetric studies are desirable criteria in placing the geographical location of areas.

Dr. Ginsburg, an expert in marine geology and sedimentology testified unequivocally that the Internatinoal Hydrographic Bureau's boundary between the Gulf and Atlantic has no scientific basis whatsoever in terms of those parameters which form the basis for geologic and geomorphic boundaries.[68]

The Federal Government suggests, and the Master agrees at Page 20 of his Report, that Chapter 29744, Laws of Florida, 1955[69] which stated that the Florida Straits are an arm of the Atlantic Ocean should have some bearing on where the Gulf and Atlantic are actually located, and should have effect on defining the meaning of terms within the Submerged Lands Act.

Of course, Florida Statutes do not control the meaning and intent of Federal acts of Congress or should they be given that result. Furthermore, Florida is certain that if its acts stated the Florida Straits were in the Gulf of Mexico, the Federal Government would contend should expression has no place in the determination of Congressional intent.

[68] TR 287, 457.
[69] U.S. Exhibit No. 91.

Additionally, Chapter 29744 was repealed by virtue of Chapter 71-348, Laws of Florida, 1971, which indicates the Florida Legislature does not know or have a continuing opinion as to the location of the Gulf of Mexico.

Nevertheless, the record reveals geologists and oceanographers define the Straits of Florida and Florida Keys as being in the Gulf of Mexico.

In the 1957 edition of the Encyclopedia Britannica, Volume 15, at Page 397[70] defines the Gulf of Mexico as follows:

> "Mexico, Gulf of, a mediterranean gulf almost surrounded by the coasts of the United States and Mexico, and forming the northern division of the extension of the westward of the west Atlantic trench (see Atlantic Ocean). Its southern boundary is defined by the partly submerged ridge which extends eastward from the peninsula of Yucatan, and on which the island of Cuba is situated; *to the east it communicates directly with the Atlantic by the Strait of Florida.*"
>
> "*The continental shelf is for the most part narrow, its breadth is 6 mi. at Cape Florida,* 120 mi. along the west coast of Florida, 10 mi. at the southern pass of the Mississippi, 130 mi. near the boundary of Texas and Louisana, and 15 mi. off Veracruz." [Emphasis supplied].

The article is quite clear to the effect that Cape Florida off Miami and the Florida Keys are within the Eastern margins of the Gulf. (TR 275)

Dr. DeVorsey, witness for the Plaintiff, agreed the 1957 edition included most of the Straits of Florida in the Gulf of Mexico (TR 539); however, the 1971 edition of the Encyclopedia Britannica would seem to differ with the 1957 edition

[70] Florida Exhibit No. 3.

as to the location of the Gulf because of stated difference in total area indicating the Straits of Florida were deleted in the later edition.

The 1971 edition listed its only reference source as Volume 55, Fishery Bulletin of the Fish and Wildlife Service, Government Printing Office, 1954 (TR 540). The Federal Government Document did not support the 1971 edition but in fact affirmed the 1954 edition. Consider the testimony of Dr. DeVorsey at TR 541 reading from the Fishery Bulletin:

Q. Then would you turn to page 51 in Bulletin 55 and read the paragraph marked in red. . . .

A. Biogenous Environment, and then the paragraph reads, "The Florida Keys are partly coralline, partly of other origin (Cooke, 1945, Plate 1, and 1939, pages 68 through 72). "The main eastern key range is considered to be a former barrier coral reef of the elevated Pleistocene Pamlico (25 foot) shoreline, now emerged and dead. Its highest present natural ground elevations are said to be about 18 feet above present mean sea level. "This key range ends to the southwest in the Boot, Marathon and Vaca group of Keys."

Q. From reading this source material on which Mr. Kyer drafted his article, can we conclude that the source states that the Keys and the Straits of Florida are in the Gulf of Mexico?

A. Yes.

In the 1971 edition of the McGraw-Hill Encyclopedia of Science and Technology on Page 337,[71] the Oceanographer Hugh J. McLellan describes the Florida Shelf and Florida

[71] Florida Exhibit No. 4.

Keys as being part of the submarine structures and deposits of the Gulf of Mexico. (TR 276).

In the March, 1971 edition of the prestigious *Bulletin of the Geological Society of America* Dr. Robert W. Bergantino in his article[72] makes it quite clear that he includes the area South of the Florida Keys up to longitude 80° West as part of the Gulf. (TR 278)

Again in the March 1972 edition of the Bulletin of the Geology Society of America, two authors Drs. Oscar Wilhelm and Maurice Ewuing in an article entitled "Geology and History of the Gulf of Mexico"[73] place the Straits of Florida and the entire Florida Platform in the Gulf of Mexico. (TR 279-282)

Dr. Ginsburg constructed the location of the Gulf by considering primarily submarine topography and the underlying geologic structure of the Gulf Basin. This primary consideration was supported by contrasting the coast line and bottom deposits or sediments of the two regions in question. (TR 288)

Dr. Ginsburg testified that:

"The most direct way to consider the boundary indicated by the submarine topography is to visualize the region as a terrestrial landscape. If all the covering seawater were removed, the boundary of the Gulf Basin would be determined as it is for terrestrial basins by the limits of its watershed. The limit of the watersheds between adjacent

[72] Florida Exhibit No. 5.
[73] Florida Exhibit No. 6.

basins is the drainage divide, the line that separates surface basins."

By utilizing three contour charts[74] the witness positioned the northern boundary of the Gulf at latitude 25° 531′ North. In considering sediments, Dr. Ginsburg testified commencing at 292:

Q. Are there changes in geologic structure or bottom deposits that occur near the boundary you have suggested of Latitude 25° 53′ North?

A. Yes, there are two important changes in the coastal and terrestrial topography at about this same latitude and a major change in the bottom deposits.

The Atlantic Coast of the United States from Long Island to Key Biscayne, Florida is characterized by sandy beaches of siliceous sand. For most of this distance, and especially along the Florida and Georgia coasts, the shoreline is formed by barrier islands of siliceous sand separated from the mainland.

The last of these barrier islands is Key Biscayne, and the southernmost piont of Key Biscayne, the location of the former Cape Florida Lighthouse, is at Latitude 25° 40′ North. . . .

Some five miles south of Cape Florida at Soldier Key, Latitude 25° 35′ 30″ North, is the first exposure of Late Pleistocene Key Largo Limestone, an elevated coral reef some 100,000 years old.

The Key Largo Limestone extends from Soldier Key, some 150 miles to Key West; it forms the Upper Florida Keys and the southeast-facing margins of the Lower Keys.

[74] Florida Exhibits 9, 10 and 11.

This relatively abrupt change from elevated coral reef limestone south of Soldier Key to Atlantic type sandy barrier islands north of Cape Florida is a major change in coastal type and coastal morphology.

Q. Considering all the evidence you have discussed, where would you place the boundary between the Gulf and Atlantic?

A. In my opinion, the boundary should be located at Latitude 25° 40′ North, the position of Cape Florida, which means the Florida Keys and the Straits of Florida southwesterly of Latitude 25° 40′ North are located in the Gulf of Mexico.

The weight and quality of evidence clearly indicates that Florida's contention as to the location of the Gulf of Mexico is correct.

FLORIDA'S CLAIM TO FLORIDA BAY AS A JURIDICAL BAY

The Master on Page 46 of his Report finds the area lying east of a straight line from East Cape of Cape Sable to Knight Key is a juridical bay.

Nevertheless, the Master on Page 47 of his Report finds Key West, rather than Knight Key, is the natural southern entrance point of Florida Bay and states the closing line of Florida Bay should be drawn from East Cape of Cape Sable to the Spenish banks low-tide elevation which is about two miles northeast of Big Spanish Key, except for a gap in the chain of keys west of Knight Key through which the Moser Channel passes. The Master finds the channel has a depth of ten to fifteen feet and the channel separates the "lower Florida Keys" from the "upper keys".

The Master errs in his finding that the lower keys are separated from the upper keys or that any of the keys are separated from the mainland. The source of the Master's error lies in his apparent and absolute disregard of the Overseas Highway (United States Highway No. 1). Also, it should need no supporting documentation to assert that a fifteen-foot channel will not accommodate ocean-going vessels.

United States Highway No. 1 stretches from Jew Fish Creek to Key West, a distance of 107.6 miles and crosses 63 keys connected by 42 bridges, none of which span a channel sufficient for navigation by ocean-going vessels with a draft greater than 25 feet. (Florida Exhibit 164, TR 221).

Clearly, the keys are connected to the mainland by activity of the Federal Government in financing and constructing the overseas highways and no distinction should be made as to lower and upper keys. The keys must, as a matter of fact, be considered as a part of the mainland and the Master erred in finding that the keys were separated in any way from each other. The Court must disregard the Master's Order and find that the closing line of Florida Bay, as a juridical bay, is drawn from East Cape of Cape Sable to the Spanish banks low-tide elevation as stated above.

SUMMARY

The Master should have found as follows based on the weight of the evidence and the controlling law, and he clearly erred in finding to the contrary:

(1) That the Act of Congress of June 25, 1868, 15 Stat. 73, approving Florida's boundary was an implied grant to the State of Florida of the right, title and interest possessed by the United States in such area or any interest subsequently obtained by the United States.

(2) That the boundary approved by Congress in 1868 is Florida's only lawful boundary and has not been modified by any subsequent unilateral legislative act of the State of Florida, and such boundary should be construed in relevant part as follows:

> "Begin at the point where the middle of the St. Mary's River meets the last aid to navigation marking the entrance to said river; thence southeastwardly to and along the 10-fathom contour line paralleling the cost of Florida to a point where such line intersects with the 100-fathom contour line which marks the western edge of the Gulf Stream; thence in a general southwestwardly direction along the 100-fathom line to a point due east of Fowey Rocks; thence in a general southwestwardly and westwardly direction along the southern edge of the Florida reefs to a point due south of Loggerhead Key, the westernmost of the Dry Tortugas Islands; thence westwardly, northerly and eastwardly along the arch of a curve three leagues distance from Loggerhead Key to a point due north of Loggerhead Key; thence northeast along a straight line to a point three leagues from the coastline of Florida . . ."

(3) That the area bound on the south by the Florida Keys, on the northwest by the mainland of Florida and on the northwest by line north 045 degrees east from the Tortugas Islands to Cape Romans is historic waters or an historic bay and as such is an integral geographical part of the state, and such area should be enclosed by base lines marking the outer limits of inland waters as follows:

"Beginning at the seaward end of the northern Jetty of Miami Harbor, Miami, Florida, also known as Government Cut, said point being the point of beginning of a base line; thence running on a direct line southeasterly to Fowey Rocks, thence in a southwesterly direction thruogh Brewster Reef, Ledbury Reef, Star Reef, Triumph Reef, Long Reef, Ajax Reef, Pacific Reef, Turtle Reef, Carysfort Reef, The Ecbow, French Reef, Molasses Reef, Picles Reef, Conch Reef, Little Conch Reef, Davis Reef, Crocker Reef, Alligator Reef, to the Tennessee Reef Light better described on Coast and Geodetic Survey Chart No. 1250 as FL. 4 Sec. 49 ft. 12M, thence continue in a southwesterly direction through Sombrero Key, Looe Key, American Shoal, Maryland Shoal, Pelican Shoal, Eastern Sambo, Western Sambo, Eastern Dry Rocks, and Sand Key to the Western Dry Rock, thence in a northwesterly direction through Vestal Shoal, Coalbin Rock, to Cosgrove Shoal; thence in a direct line to an unnamed rock, lying 231 degrees from the Lighthouse at Loggerhead Key at a distance of 4,224 feet more or less, thence in a northeasterly dircetion to Texas Rock, thence in a direct line northeasterly to the southernmost point of Cape Romano.

(4) In the alternative, if Florida is incorrect in its first contention and Florida's territory in the Atlantic and Gulf of Mexico is limited to a claim under the Submerged Act, then the line dividing the Gulf of Mexico from the Atlantic should be located at longitudie 25 degrees 40 minutes north, the position of Cape Florida, which means the Florida Kays and the

State of Florida southwestwardly of said latitude are located in the Gulf of Mexico.

(5) In the alternative, if Florida is incorrect in its first three contentions, then the Master's Report should be accepted, except that the base line enclosing Florida Bay as a juridical bay should be drawn from East Cape of Cape Sable to the Spanish banks low-tide elevation which is about two miles northeast of Big Spanish Key, and that line should make the outer limits of Florida's inland waters on that portion of her coastline.

Respectfully submitted

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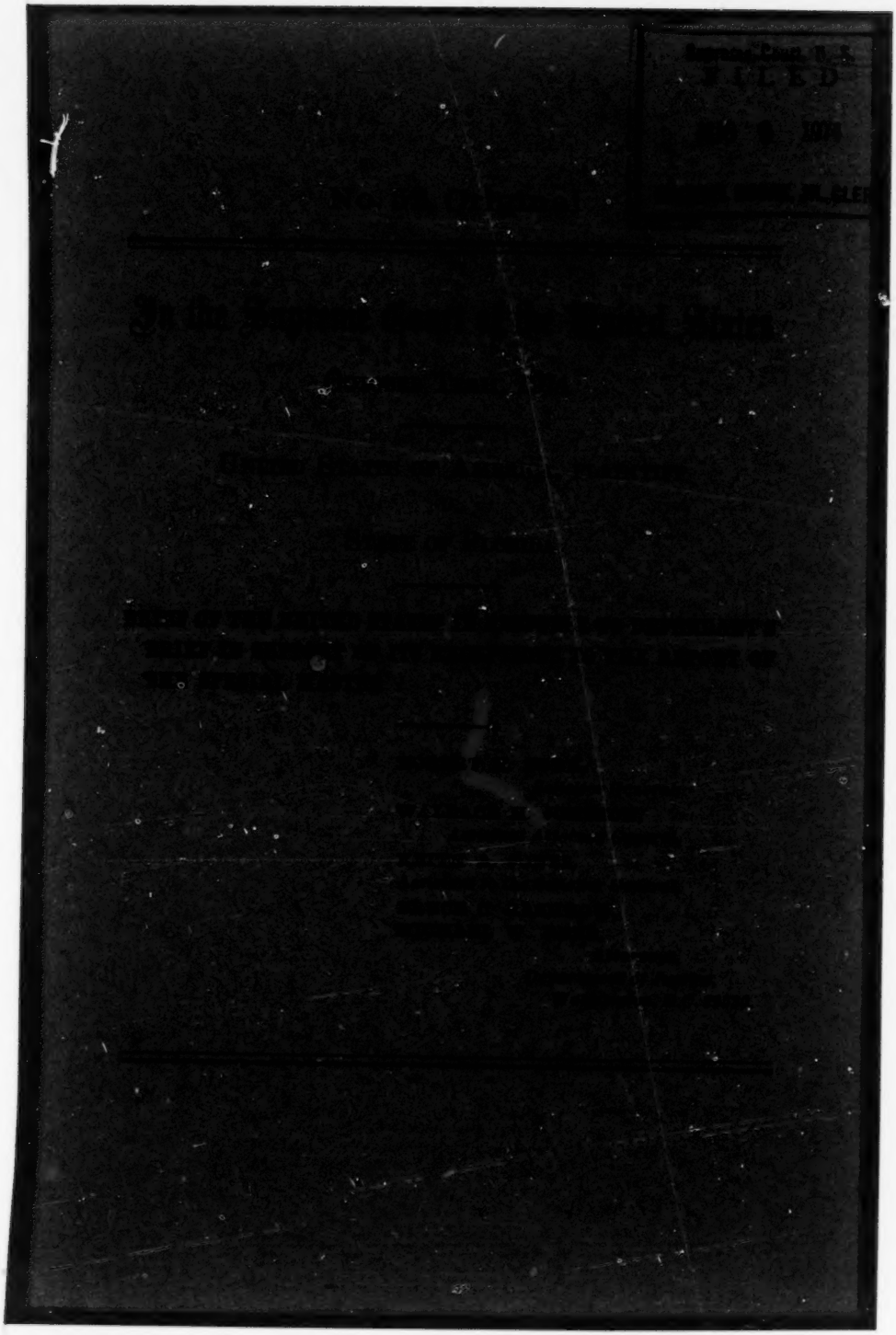
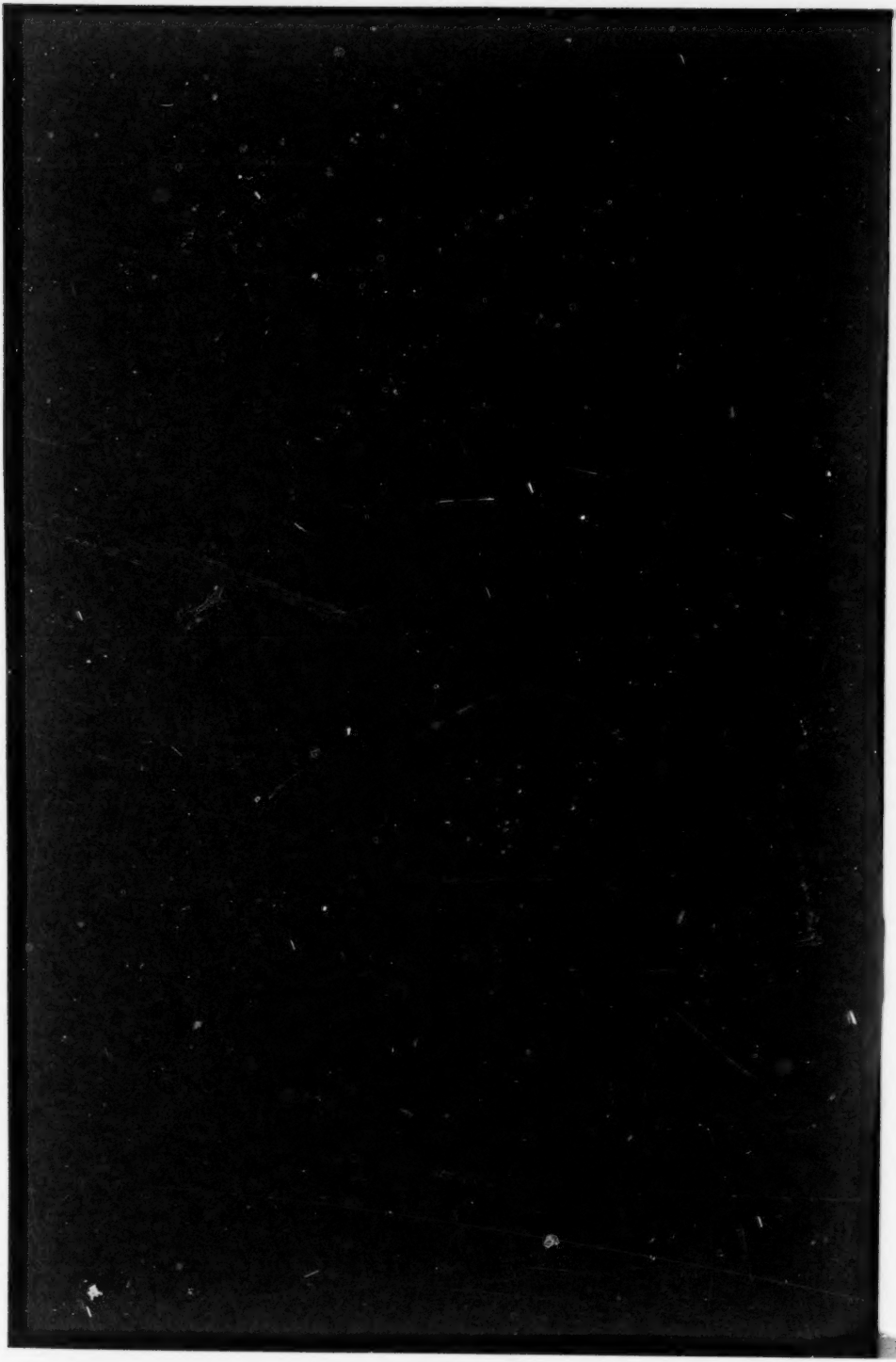
April 24, 1974





INDEX

	Page
Introduction	1
Argument:	
I. The State's rights in the resources of the seabed adjacent to its coasts are limited to those conferred by the Submerged Lands Act	4
A. The State possessed no rights in the resources of the seabed prior to the enactment of the Submerged Lands Act	4
B. The Special Master correctly determined the State's historic boundary	8
1. The State's historic boundary on the Atlantic Ocean between St. Mary's River and the Lake Worth inlet ran along the coastline	9
2. The State's historic boundary on the Gulf of Mexico ran along a line three marine leagues seaward of the coastline, with a southeastwardly connecting link between the Tortugas Islands and the Marquesas Keys	11

555-201—74——1

Argument—Continued
I. The State's rights—Continued
C. In any event, after enactment of the Submerged Lands Act, the State relinquished any claim to the seabed seaward of its grant under that Act ..... Page 16
II. The Special Master properly determined the dividing line between the Atlantic Ocean and the Gulf of Mexico for purposes of the Submerged Lands Act .. 19
III. The State possesses no substantial inland waters between the Tortugas Islands and Cape Romano 21
A. The waters lying east of a straight line running from the Tortugas Islands to Cape Romano do not comprise an historic bay 21
B. The waters lying east of a straight line running from the Spanish Banks low-tide elevation to the East Cape of Cape Sable do not comprise a juridical bay 25
Conclusion 29

CITATIONS

Cases:
Benson v. *United States*, 146 U.S. 325 17
Fort Leavenworth R.R. Co. v. *Lowe*, 114 U.S. 525 17
Mason Co. v. *Tax Commission*, 302 U.S. 186 .. 17
Michigan v. *Ohio*, 410 U.S. 420 14
Petersen v. *United States*, 191 F. 2d 154, certiorari denied *sub nom. California* v. *United States*, 342 U.S. 885 17
S.R.A., Inc. v. *Minnesota*, 327 U.S. 558 17
United States v. *California*, 332 U.S. 19 ..... 2, 5, 7

Cases—Continued Page
United States v. *California*, 381 U.S. 139 ..... 22, 25
United States v. *Florida*, 363 U.S. 121 ... 2, 8, 15–16
United States v. *Louisiana*, 339 U.S. 699 ..... 5, 6
United States v. *Louisiana*, 363 U.S. 1 .. 7, 10, 17–18
United States v. *Louisiana*, 364 U.S. 502 2
United States v. *Louisiana*, 394 U.S. 11 ..... 22, 25, 26, 27, 29
United States v. *Texas*, 339 U.S. 707 5
Constitution, treaty, statutes, and proclamation:
United States Constitution, Fourteenth Amendment 7
Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. (Pt. 2) 1606:
Article 4(3) 2, 8
Article 7 ..... 25, 27, 28, 29
Act of September 9, 1850, 9 Stat. 452 5
Act of March 2, 1867, 14 Stat. 428 4
Act of March 23, 1867, 15 Stat. 2 4
Act of June 25, 1868, 15 Stat. 73 ..... 4, 7
Submerged Lands Act of 1953, 67 Stat. 29, 43 U.S.C. 1301 *et seq* 1
Section 2(b) (43 U.S.C. 1301(b)) 8
Section 2(c) (43 U.S.C. 1301(c)) 21
Presidential Proclamation No. 2667, 59 Stat. 884 17
Miscellaneous:
4 Whiteman, *Digest of International Law* 14–137 (1965) 18

In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 52, ORIGINAL

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF FLORIDA

BRIEF OF THE UNITED STATES IN RESPONSE TO DEFENDANT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

INTRODUCTION

This case involves the respective rights of the State of Florida and the United States in the natural resources of the seabed adjacent to the State's coasts, in both the Atlantic Ocean and the Gulf of Mexico. The facts are set forth at pages 2 through 6 of our brief in support of the United States' exceptions to the Report of the Special Master. In this brief we respond to the State's brief in support of its exceptions to that Report.

In previous litigation between these parties, this Court determined that the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, grants the State ownership of

the resources of the seabed within three geographic miles of its coastline along the Atlantic Ocean, and within three marine leagues of its coastline along the Gulf of Mexico. *United States* v. *Florida,* 363 U.S. 121; *United States* v. *Louisiana,* 364 U.S. 502.

In this litigation the State asserts that congressional approval of its 1868 constitution effected a grant to the State of proprietary rights in all resources of the seabed within its historic boundary which, the State claims, lay seaward of the maximum grants of three geographic miles and three marine leagues under the Act. The Special Master, relying upon *United States* v. *California,* 332 U.S. 19, and several subsequent tidelands decisions of this Court, held that the State possessed no proprietary rights in the seabed prior to enactment of the Act (Report, pp. 8–11). The Special Master further determined that the State's historic boundary did not, except in the area between the Marquesas Keys and the Tortugas Islands, lie substantially seaward of the line marking the outer limits of the State's Submerged Lands Act grant (Report, pp. 21–32, 32–36) and that the State, by constitutional amendment, has in any event relinquished its claim to the seabed seaward of those limits (Report, pp. 11–18). The Special Master therefore concluded generally that the State's rights in the resources of the seabed adjacent to its coast are limited to those conferred by the Act. The State excepts (Br. 7–31) to this conclusion and to the determinations on which it is based.

Previous litigation had left unresolved two important questions pertaining to the proper application of the Act to the particular circumstances of this case. (1) The seabed rights granted to the State by the Act extend three marine leagues into the Gulf of Mexico but only three geographic miles into the Atlantic Ocean; the Act, however, does not define the dividing line between those two bodies of water. The Special Master, accepting the views of geographers, cartographers, historians, and explorers, determined that the dividing line between the Atlantic Ocean and the Gulf of Mexico runs due north from Cuba to the Tortugas Islands and thence generally northeastwardly through the Florida Keys to the mainland (Report, pp. 18–21). The State excepts to this determination, contending (Br. 50–57) that the Atlantic Ocean ends at the southern terminus of Key Biscayne, and that all waters southwest of that point lie in the Gulf of Mexico. (2) The Special Master also fixed the State's coastline for purposes of the Act. The only coastline in dispute was that along the Gulf of Mexico between the Tortugas Islands and Cape Romano. The Special Master rejected the State's contention that the large body of water designated by the State as Florida Bay is an historic bay, but he determined that a small portion of those waters, lying to the east of a line running from the East Cape of Cape Sable to Knight Key, is a juridical bay under the Convention on the Territorial Sea and the Contiguous Zone; the Special Master determined that that juridical bay constitutes inland waters of the State and that the

seaward limit of those inland waters marks the State's coastline for purposes of the Act (Report, pp. 36–47, 52–54). The State excepts to the Special Master's finding that none of the waters constitute an historic bay (Br. 31–50); in the alternative, the State contends that the Special Master should have located the closing line of the juridical bay, and therefore the State's coastline, further west (Br. 57–58).

ARGUMENT

I

THE STATE'S RIGHTS IN THE RESOURCES OF THE SEABED ADJACENT TO ITS COASTS ARE LIMITED TO THOSE CONFERRED BY THE SUBMERGED LANDS ACT

A. THE STATE POSSESSED NO RIGHTS IN THE RESOURCES OF THE SEABED PRIOR TO THE ENACTMENT OF THE SUBMERGED LANDS ACT

Following the Civil War, the rebel States were readmitted to representation in Congress only upon congressional approval of their new constitutions. See Acts of March 2, 1867, 14 Stat. 428, and March 23, 1867, 15 Stat. 2. The new constitution of the State of Florida was approved by Act of June 25, 1868, 15 Stat. 73. Included in that constitution was a description of the State's boundary. Although, as we show below (pp. 8–16, *infra*), the State now exaggerates the seaward reach of that boundary, the Special Master found (Report, pp. 23–24), and we concede, that between the Tortugas Islands and the Marquesas Keys the State's 1868 boundary did in fact lie more than three geographic miles seaward of its coastline along the Atlantic Ocean and more than three marine leagues seaward of its coastline along the Gulf of Mexico. In

other words, in that area the State's historic boundary lay seaward of the line marking the outer limits of the State's Submerged Lands Act grant.

The State contends here (Br. 7–17) that in addition to the proprietary rights conferred by the Act it is also entitled to ownership of that portion of the seabed lying seaward of the three-mile or three-league belt conveyed by the Act but within the State's historic boundary. The State's theory is that congressional approval of its 1868 constitution effected a grant to it of proprietary rights in the seabed within that boundary.

This claim is essentially indistinguishable from that made by the State of California in *United States* v. *California,* 332 U.S. 19. California's 1849 constitution had fixed its boundary in the Pacific Ocean three miles seaward of the low-water mark, and that constitution was ratified upon California's subsequent admission to the Union. Act of September 9, 1850, 9 Stat. 452. This Court nevertheless concluded that the United States, and not California, was entitled to the natural resources of the seabed within that three-mile belt, reasoning that "national interests, responsibilities, and therefore national rights are paramount in waters lying to the seaward [of the low-water mark]" (332 U.S. at 36). This determination of the paramountcy of national rights in the offshore seabed was explicitly reaffirmed in *United States* v. *Louisiana,* 339 U.S. 699, 704, and *United States* v. *Texas,* 339 U.S. 707, 719. In all three cases those States, like Florida here, asserted historic maritime boundaries.

555-201—74——2

But as the Court noted in its *Louisiana* decision (339 U.S. at 704):

> * * * [T]he issue in this class of litigation does not turn on title or ownership in the conventional sense. * * * Protection and control of the [marginal sea] are * * * functions of national external sovereignty. * * * The marginal sea is a national, not a state concern. National interests, national responsibilities, national concerns are involved. The problems of commerce, national defense, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area.

Moreover, the Court in those cases was not concerned merely with the three-mile marginal belt. Louisiana claimed a boundary 27 miles seaward of the low-water mark, and Texas claimed a boundary three marine leagues from shore. But the Court held that the nation's interests and rights did not terminate at the edge of the three-mile belt (*United States* v. *Louisiana, supra,* 339 U.S. at 705):

> * * * The matter of state boundaries has no bearing on the present problem. If, as we held in California's case, the three-mile belt is in the domain of the Nation rather than that of the separate States, it follows *a fortiori* that the ocean beyond that limit also is. The ocean seaward of the marginal belt is perhaps even more directly related to the national defense, the conduct of foreign affairs, and world commerce than is the marginal sea.

These decisions require rejection of Florida's claim that mere congressional approval of its constitution effected an implicit grant of proprietary rights in the seabed within its historic boundary. Although such

approval "authorized [the State] to exercise local police power functions in the part of the marginal belt within its declared boundaries, these do not detract from the Federal Government's paramount rights in and power over this area." *United States* v. *California, supra,* 332 U.S. at 36.[1]

Moreover, the State has failed to adduce any evidence showing that Congress in 1868 made an express grant of proprietary seabed rights. Congressional approval of the constitutions of the formerly rebel States was required to ensure the establishment in each of those States of a republican form of government in conformity with the federal Constitution, including the Fourteenth Amendment. In the Act of June 25, 1868, Congress approved the constitutions of Florida and five other states, and it appears from the face of the Act that the concern of Congress was to ensure that the six states had "framed constitutions of State government which are republican." 15 Stat. 73. Congressional approval of Florida's 1868 constitution therefore indicated nothing more than Congress' considered judgment that the system of state government established thereunder complied with the federal Constitution. Of course, in making that judgment Congress also incidentally approved the State's constitutional boundaries. See *United States* v. *Florida, supra,* 363 U.S. at 128. But as the Special Master observed, "no language in either the Acts of 1867 or the Act of

[1] The State's general assertion (Br. 7–15) that the *California* decision does not apply here is without legal basis. This Court has expressly held that the underlying legal doctrine of the *California* decision survived enactment of the Submerged Lands Act and is applicable to all coastal States. See *United States* v. *Louisiana*, 363 U.S. 1, 6–7.

1868 even remotely suggest[s] that Congress by the Act of 1868 intended to make a grant to the State of the seabed within those boundaries or that it did in fact do so" (Report, p. 8).

Accordingly, the State had no proprietary rights in the seabed adjacent to its coasts prior to the enactment of the Submerged Lands Act, and the only rights it now possesses are those conferred by that Act.

B. THE SPECIAL MASTER CORRECTLY DETERMINED THE STATE'S HISTORIC BOUNDARY

The proper location of the State's historic boundary is relevant to this litigation only if this Court determines that the State possesses proprietary rights in the resources of the entire seabed landward of that boundary. If, as we have argued above (pp. 4–8, *supra*), the State's seabed rights derive solely from the Submerged Lands Act, the historic boundary is relevant only to the question whether the State qualifies for the maximum Submerged Lands Act grant of three marine leagues in the Gulf of Mexico. That question, however, is not at issue here; we concede that in the Gulf of Mexico, as defined by the Special Master (see pp. 19–20, *infra*), the State is entitled to the maximum three-league grant provided by Section 2(b) of the Act.[2] Thus if this Court agrees with the Special Master that the State's seabed rights derive solely from the Submerged Lands Act, it need

[2] If, however, this Court determines, contrary to the finding of the Special Master, that the large body of water designated by the State as Florida Bay constitutes an historic bay (see pp. 21–25, *infra*), the State would be entitled under the Act only to a three-mile grant seaward of the closing line of that bay, for the State does not claim an historic boundary seaward of that closing line.

not consider the actual extent of the State's historic boundary.

Furthermore, as we show below (pp. 16–19, *infra*), the State has amended its constitution to fix its boundary at the line that marks the outer limits of its Submerged Lands Act grant and therefore has abandoned any claim to ownership of the seabed seaward of those limits. But we now show that the Special Master in any event correctly determined that the State's historic boundary did not, except in the area between the Marquesas Keys and the Tortugas Islands, extend substantially beyond the outer limits of the State's grant under the Submerged Lands Act.

1. *The State's historic boundary on the Atlantic Ocean between St. Mary's River and the Lake Worth inlet ran along the coastline*

The State's eastern boundary under its 1868 constitution ran "down the middle of [St. Mary's River] to the Atlantic Ocean; thence southeastwardly along the coast to the edge of the Gulf Stream" (U.S. Ex. 6). This boundary call admittedly is logically incomplete. The description "down the middle of said river to the Atlantic Ocean" calls in plain terms for a boundary that stops at the margin of the ocean; similarly, the description "southeastwardly along the coast" calls for a boundary running along the coastline and not offshore. However, the Gulf Stream never touches the shore; the boundary must at some point leave the coastline in order to meet the Gulf Stream's edge. The problem confronting the Special Master was to determine where the constitutional draftsmen had intended the boundary to leave the shore.

The State's eastern coastline runs generally southeastwardly from St. Mary's River to a point approximately one mile north of the Lake Worth inlet, and then takes a general southwestwardly turn. The Special Master determined that the State's historic boundary left the coastline at that point and continued in a southeastwardly direction until it reached the western edge of the Gulf Stream, which in that area follows the 100-fathom contour parallel to and approximately three miles from the coast (Report, pp. 21–22).

The State contends (Br. 18–22) that the Special Master should have found that the boundary ran into the ocean out to the 10-fathom contour at the mouth of St. Mary's River, and then along the 10-fathom contour to a point east of the Lake Worth inlet, and then due east to the Gulf Stream at the 100-fathom contour.

We see no basis for construing the boundary as extending into the ocean at the mouth of St. Mary's River. The construction urged by the State is the same as that urged by the State of Louisiana, and rejected by this Court, in a virtually identical context. Louisiana's historic boundary ran "along the middle of the [Iberville River], and lakes Maurepas and Ponchartrain, to the Gulf of Mexico," and Louisiana contended that the boundary extended at that point into the Gulf of Mexico. This Court disagreed, noting succinctly that "[t]he boundary line is drawn * * * '*to* the Gulf of Mexico,' not *into* it * * *." *United States* v. *Louisiana*, 363 U.S. 1, 67 (emphasis in original). The same result is appropriate here: the boundary runs "*to* the Atlantic Ocean" and then

"along the coast," and this description is not compatible with a boundary running *into* the Atlantic Ocean and then along the 10-fathom contour.

Moreover, the State's contention is not even supported by its own evidence. The State's only witness on this point was an aviation navigator who testified that the boundary call "to the Atlantic Ocean" should be construed as describing a boundary extending into the ocean only so far as the last sea buoy off the mouth of St. Mary's River (Tr. 306); he conceded that this buoy was some 5 miles landward of the 10-fathom contour claimed by the State as its boundary (Tr. 574). The witness did not testify concerning the connecting link between the 10-fathom contour and the 100-fathom contour that is necessary under the State's theory.

We believe that the Special Master's determination of the State's eastern historic boundary is correct. It adheres to the literal meaning of the phrase "to the Atlantic Ocean" and "along the coast," and it complies with the call's "southeastwardly" directive.

2. *The State's historic boundary on the Gulf of Mexico ran along a line three marine leagues seaward of the coastline, with a southeastwardly connecting link between the Tortugas Islands and the Marquesas Keys*

The State's historic boundary in the Gulf of Mexico between the Tortugas Islands and the mainland is described in its 1868 constitution as running from the Tortugas "northeastwardly to a point three leagues from the mainland" (U.S. Ex. 6). The Special Master determined that this boundary ran along a line three marine leagues from the coastline, with a southeastwardly

connecting link from the Tortugas to the Marquesas Keys (Report, pp. 24–31). The State contends (Br. 22–28) that the boundary call instead describes a line running due northeast from the Tortugas to Cape Romano on the mainland—a contention that, if accepted, would result in the inclusion within the State's historic boundary "of a very large roughly semicircular area of comparatively deep water of the continental shelf in the Gulf of Mexico" (Report, p. 26).

The State's contention rests principally upon the mere claim that the call's "northeastwardly" directive necessarily requires a straight line running due northeast. That claim was fully and properly refuted by the Special Master (Report, pp. 25–26):

> * * * The term "northeastwardly" does not indicate a specific direction as may the more precise term "northeast". On the contrary, "northeastwardly" merely indicates a general direction which may be anywhere between north and east, depending upon other factors such as any relevant meets and bounding features which may be specified or implied. Here only one meet is specified, the Dry Tortugas Islands. The other end of this segment of the boundary, a "point three leagues from the mainland", is indefinite since it may be located at any place on the outer line of the three-league belt of marginal sea lying along the coast of the mainland. We must, therefore, look elsewhere for light on the intended location of this portion of the boundary.
>
> The State of Florida points to the physical fact that the western portion of the boundary contended for by the United States actually

runs southeastwardly rather than northeastwardly and does not take a northeasterly course until it reaches the vicinity of Boca Grande Key. This is quite true, but I do not believe that the term "northeastwardly", as here used, is to be given so restricted a meaning. On the contrary, as I have already suggested, I think it is intended to indicate merely the general direction of this section of the boundary taken as a whole. In this broad sense the line contended for by the United States does run northeastwardly. Both Cape Sable and Cape Romano, the termini contended for by the United States and the State, respectively, are in fact situated north and east of the point of beginning, the Dry Tortugas. A consideration of other language in the 1868 Constitutional boundary description fortifies this view. Thus the line along the Florida Reefs and to the Dry Tortugas is defined by the 1868 Constitution as running "southwestwardly" whereas the western end of the line actually runs northwestwardly. But the fact remains that the Dry Tortugas are in fact located south and west of Fowey Rocks so that the line connecting them may fairly be said in a general sense to run southwestwardly. Likewise the line defining the boundary along the Gulf coast of the mainland north of the area here under discussion is defined as running "northwestwardly three leagues from the land, to a point west of the mouth of the Perdido river". A long section of this line runs northeastwardly and another section southwestwardly but the mouth of the Perdido river is unquestionably north and west of Cape Sable and Cape Romano and the line as a whole may, therefore,

555-201—74——3

> fairly be described as running "northwestwardly." I am satisfied, therefore, that the use of the term "northeastwardly" does not eliminate the possibility of a boundary which in certain places deviates from that general direction so long as one terminal point is definitely north and east of the other.

We add only that if the State's constitutional framers had intended a straight line running due northeast, they could have easily described such a line. See p. 30 of the Report of the Special Master in *Michigan* v. *Ohio,* 410 U.S. 420 (No. 30, Original).

After concluding that a straight line running due northeast was not mandated by the 1868 constitution, the Special Master proceeded to consider the likely intent of the constitutional framers (Report, pp. 26–27):

> * * * [T]he great weight of the evidence before me, consisting of ancient documents received as exhibits and the testimony of expert witnesses, establishes, and I find, that in 1868 and prior thereto the interests of the State of Florida and its residents in this area were almost entirely limited to the taking of sponges, turtles and fish in the comparatively shallow waters, less than three fathoms deep, adjacent to the Keys and in the channels between them. It appears that in those days activities, other than shipping, in the area of deeper water to the North and West of the Keys were very minimal and the economic interests of southern Florida did not extend seaward into that area to any substantial extent. There is no evidence to indicate, and I do not believe, that the framers of the

1868 Constitution gave actual attention to this large area of the Gulf of Mexico or intended to include it within the State boundaries.

We submit that the Special Master properly evaluated the evidence on this point. See, *e.g.*, Tr. 114–130; U.S. Ex. 39, p. 4. Against this, the State offers little more than the fact that its expert witness *"suggest[ed]* that Floridians of the period were aware of resources in the deeper waters * * * and *conceivably* had an interest in claiming the area" (Br. 24; emphasis added). That "suggest[ion]" of a merely "conceivabl[e]" interest is not, of course, a sufficient basis for overturning the Special Master's finding, which is based upon the preponderance of the evidence. Moreover, the State's witness in fact conceded that as of 1868 only the shallow waters were of significant economic interest to the State (Tr. 515).

The United States had contended below that, in view of the fact that in 1868 the State would have been interested in claiming only the shallow waters near shore, the boundary should follow the three-fathom and five-fathom contours north of the Florida Keys. These contours lie within three marine leagues of shore throughout most of the disputed waters. The Special Master, however, concluded that the language of the boundary call, read in context, strongly suggests that the framers intended a three-league boundary (Report, pp. 27–28), and we now agree with that conclusion. Moreover, that reading appears to accord with this Court's previous understanding of the location of that boundary. See *United States* v. *Florida*,

supra, 363 U.S. at 129; *United States* v. *Louisiana*, *supra*, 364 U.S. at 503.

C. IN ANY EVENT, AFTER ENACTMENT OF THE SUBMERGED LANDS ACT, THE STATE RELINQUISHED ANY CLAIM TO THE SEABED SEAWARD OF ITS GRANT UNDER THAT ACT

In 1962, Florida amended its constitution in order to redefine its constitutional boundary. Insofar as is relevant to this litigation, the new boundary is described as running "down the middle of [St. Mary's River] to the Atlantic Ocean, and extending therein to a point three (3) geographic miles from the Florida coast line, meaning the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters; thence southeastwardly following a line three (3) geographic miles distant from the Atlantic coast line of the state and three (3) leagues distant from the Gulf of Mexico coast line of the state to and around the Tortugas Islands; thence northeastwardly, three (3) leagues distant from the coast line, to a point three (3) leagues distant from the coast line of the mainland" (Report, p. 16). Under this amendment, the State's maritime boundary runs along the line marking the seaward limit of the State's Submerged Lands Act grant.

The Special Master properly determined that the effect of the 1962 amendment was to relinquish any claim of state ownership of the seabed lying seaward of the Submerged Lands Act grant (Report, pp. 17–18, 28–29). The State concedes (Br. 29) that the 1962 amendment purported to reduce its boundary,

at least in the Atlantic Ocean, but nevertheless contends (Br. 28–31) that the amendment was not effective because it has never expressly been approved by Congress.

It is clear that the States have authority to cede jurisdiction over areas within their boundaries to the United States. See, *e.g.*, *Petersen* v. *United States*, 191 F. 2d 154, 156 (C.A. 9), certiorari denied *sub nom. California* v. *United States*, 342 U.S. 885. Explicit congressional approval of such cessions is not necessary, for "[t]he acceptance by the United States at the time of the power ceded is presumed." *S.R.A., Inc.* v. *Minnesota*, 327 U.S. 558, 563. See also *Mason Co.* v. *Tax Commission*, 302 U.S. 186, 207; *Benson* v. *United States*, 146 U.S. 325, 330; *Fort Leavenworth R.R. Co.* v. *Lowe*, 114 U.S. 525, 528.

Since congressional approval is not required even when the cession of state jurisdiction imposes upon the federal government responsibility for exercising local police powers, that approval is *a fortiori* unnecessary in a case, such as this, where the State is not ceding jurisdiction but only relinquishing an adverse claim that had never been recognized by the federal government. Exclusive rights to the natural resources of the continental shelf have been claimed by the United States since the Truman Proclamation in 1945 (Presidential Proclamation No. 2667, 59 Stat. 884), and, in enacting the Submerged Lands Act, Congress confirmed that claim as to the seabed lying seaward of the three-mile and three-league limits prescribed therein. See *United States* v. *Louisiana*, *supra*, 363

U.S. at 6–7. That confirmation of federal ownership constituted ample congressional approval, if any were needed, of any subsequent relinquishment of an adverse state claim.

But the State apparently contends that even if it has authority unilaterally to relinquish a claim of seabed ownership, it has no similar authority to reduce its boundary, and that the 1962 constitutional amendment is ineffective insofar as it purports to reduce the State's maritime boundary. But whatever the pertinent considerations may be in other circumstances, there is no apparent legal obstacle to a State's unilateral reduction of its constitutional maritime boundary to or toward the three-mile line recognized by the federal government, in the conduct of its foreign affairs, as the seaward limit of the territorial sea.[3] In pending litigation, the United States has taken the position that coastal states have no right to exercise jurisdiction and control over fishing by foreign vessels and their crews beyond the territorial sea. *United States* v. *Florida and Texas,* No. 54, Original. Thus the United States has an affirmative interest in the relinquishment or nonassertion of state jurisdiction over the high seas and would welcome the voluntary withdrawal of state boundaries back to the three-mile line. Moreover, such unilateral state action would neither infringe upon the interests of other States nor conflict with any known national interest. It there-

[3] For a discussion of the United States' position with respect to the territorial sea, see 4 Whiteman, *Digest of International Law* 14–137 (1965).

fore seems clear that no practical purpose would be served by requiring congressional consent to or approval of the State's 1962 constitutional amendment as a condition of its effectiveness, and we see no legal basis for denying that amendment full force and effect.

II

THE SPECIAL MASTER PROPERLY DETERMINED THE DIVIDING LINE BETWEEN THE ATLANTIC OCEAN AND THE GULF OF MEXICO FOR PURPOSES OF THE SUBMERGED LANDS ACT

The Submerged Lands Act grants the State seabed rights extending three marine leagues into the Gulf of Mexico but only three geographic miles into the Atlantic Ocean, without precisely defining the line dividing those two contiguous bodies of water. The Special Master determined, in an opinion (Report, pp. 18–21) on which we primarily rely, that Congress intended and understood the dividing line to run due north from Cuba to the Tortugas Islands, and thence generally northeastwardly through the Florida Keys to the mainland. That line is the one formulated by the International Hydrographic Bureau and adhered to by geographers and cartographers. See Tr. 149; U.S. Ex. 63. It is also the line that historians, explorers, and other authors have long referred to as the maritime border between the two seas. See U.S. Exs. 51–53, 69.

The State urges (Br. 50–57) that the Special Master ignored "overwhelming evidence" (Br. 51) that the Straits of Florida—the waters lying to the north of Cuba and to the south of the Florida Keys and

mainland—are part of the Gulf of Mexico; according to the State, the Atlantic Ocean ends at the southern terminus of Key Biscayne. But the only evidence of substance presented by the State related to the views of marine geologists concerning the topography of the sea floor and the morphology of the coast. Since those views evolved from bathymetric and other findings made long after enactment of the Submerged Lands Act (see Tr. 472), they can shed no light upon the congressional intent. The Special Master's determination reflects the reasonable judgment that Congress contemplated and intended the dividing line designated and internationally agreed upon by geographers, cartographers, and historians at the time of enactment.

But even if, contrary to accepted canons of statutory interpretation, the statutory dividing line is to be fixed in accordance with current knowledge and opinion, rather than that prevailing at the time of enactment, the line fixed by the Special Master is nevertheless proper. Although the findings of marine geologists have undoubted scientific interest and value, those findings have not persuaded geographers and cartographers to withdraw their designation of the Straits of Florida as an arm of the Atlantic Ocean for map-making and other geographic purposes. See Tr. 149; U.S. Ex. 63. It is, of course, maps and geographic writings which supply the basis for the generally understood meanings of the terms "Atlantic Ocean" and "Gulf of Mexico", and it is to that common understanding that the nontechnical phrasing of the statute appeals.

III

THE STATE POSSESSES NO SUBSTANTIAL INLAND WATERS BETWEEN THE TORTUGAS ISLANDS AND CAPE ROMANO

The seabed rights granted by the Submerged Lands Act are measured seaward from the "coast line", which Section 2(c) of the Act defines as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." The State claims (Br. 31–50) that a line running due northeast from the Tortugas Islands to Cape Romano marks the "seaward limit of [its] inland waters," on the theory that the waters lying east of that line, between the mainland and the Florida Keys, comprise an historic bay. Alternatively, the State claims (Br. 57–58) that the seaward limit of its inland waters in that area is marked by a line drawn from the Spanish Banks low-tide elevation, two miles northeast of Big Spanish Key, to the East Cape of Cape Sable, on the theory that the waters lying east of that line comprise a juridical bay. As we now show, both claims are insubstantial.

A. THE WATERS LYING EAST OF A STRAIGHT LINE RUNNING FROM THE TORTUGAS ISLANDS TO CAPE ROMANO DO NOT COMPRISE AN HISTORIC BAY

The Special Master correctly determined that the State, in order to prove the existence of an historic bay, must show (1) that it has exercised an open, notorious, and effective sovereign authority over the waters of the bay, not merely with respect to local citizens but as against foreign nationals as well, (2)

that this authority has been exercised for a considerable period of time, and (3) that foreign nations have acquiesced in this exercise of authority (Report, p. 41). See *United States* v. *California*, 381 U.S. 139, 172; *United States* v. *Louisiana*, 394 U.S. 11, 23–24, n. 27. The State has failed to make either of these required showings with respect to the area in question.

We review each of the State's arguments in turn. First, although it is not dispositive of the State's claim, it is significant that the State has failed to establish that the waters here in question even constitute an historically identifiable area. Although the State attempts to show (Br. 37–39) that the area in question has long been designated "Florida Bay," the United States established that that designation was shown on no maps prior to 1868 (Tr. 136) and was unknown to explorers prior to the 1850's (Tr. 141), that the name "Florida Bay" is omitted from the charts and text of a comprehensive history of the State written by one of the State's principal witnesses (Tr. 512–513), and that once that name came into popular use it referred only to the waters east of "an imaginary line drawn from East Cape, on Cape Sable, southward to Vaca Key" (Tr. 144; U.S. Ex. 54), *i.e.*, to a body of water considerably smaller than that claimed by the State in this litigation.[4] These con-

[4] Moreover, the area claimed by the State as an historic bay is not a true geographic bay, for it is formed not by an indentation in the mainland but rather by the mainland and a string of islands, between some of which there are wide, navigable water gaps (Tr. 145–146).

siderations reinforce the Special Master's conclusion (Report, pp. 24–31; and see pp. 11–16, *supra*) that the State's 1868 constitution did not include the area now referred to by the State as "Florida Bay" within the State's historic boundary. There has, therefore, been no historic claim to these waters.

The State next asserts (Br. 40), without any attempt at proof, that the area here in question was ceded to the United States by Spain in 1821; there is no evidence that these waters were either possessed by Spain or ever ceded by her to the United States. The State also relies (*ibid.*) upon federal action in arresting foreign turtlers in unspecified Florida waters during the 1820's; the evidence shows, however, that turtling at that time was conducted in the shallow waters near the shore, not in the comparatively deep waters claimed by the State (U.S. Ex. 39, p. 4).

As evidence of foreign acquiescence, the State offers only an 1831 British request "for permission to allow English fishermen to fish in Florida waters" (Br. 40). However, the State's own witness was unable to show that this or any other such request by a foreign government referred to the waters here in question (Tr. 482–486). Moreover, during the 1830's the State claimed exclusive fishing rights only within a cannon shot, or three miles, of shore (Fla. Ex. 76, p. 4), so that the British request—and also the fisheries act enacted by the Florida legislature in response to that request (Br. 42)—evidently concerned only waters within the three-mile territorial sea. Similarly, there is no evidence that the State's various other fisheries

acts (Br. 42–43, 44–46) were intended to regulate fishing beyond three miles or, at most, three leagues of shore. And the fact that military fortifications were constructed on shore (Br. 43–44) clearly has no relevance to the State's claim here.

Although the State now asserts (Br. 46–48) that its current fisheries legislation applies to the entire body of water that it claims as an historic bay, the State's own witness—the Executive Director of the Florida Department of Natural Resources—conceded that this position was first taken by the State in 1968, and that prior to that time the State had asserted fisheries jurisdiction only within three leagues of shore (Tr. 548–549). He also testified that the State had never seized any foreign vessel more than three leagues from shore (Tr. 551). Moreover, the State's expert witness on the history of the State testified that he knew of no historical evidence of any effort by the State to exclude foreign fishing vessels from the expanded area it now claims (Tr. 510–511).

The only other evidence submitted by the State (Br. 48–49) pertained to offshore leases in the disputed area granted by the State to certain private individuals in 1944, 1949, and 1951, the last of which expired in 1964. The Special Master properly evaluated this evidence by observing (Report, p. 46):

> * * *[T]he leases were given only nine years, at the earliest, before the enactment of the Submerged Lands Act and * * * [therefore] do not disclose a usage sufficiently remote in time * * *. Nor do I think that they afford evidence of a use adverse to foreign nations in

> light of the accepted view in recent years that maritime nations have special rights in the bed of the continental shelf off their coasts.

Moreover, the United States has distributed to foreign governments, in response to their requests, maps showing that the disputed waters lie outside the United States' territorial sea (see U.S. Exs. 101, 102, 103, and 104) and from before enactment of the Submerged Lands Act has affirmatively disclaimed any title to the waters in question as an historic bay (see U.S. Exs. 97, 105, and 106). In view of this consistent history of federal disclaimer, the State bore the heavy burden of proving beyond a reasonable doubt that it had traditionally exercised sovereign authority over the disputed waters, and that foreign governments had acquiesced in that exercise of authority. See *United States* v. *California, supra,* 381 U.S. at 175; *United States* v. *Louisiana, supra,* 394 U.S. at 77. The Special Master correctly concluded that the State failed to carry that burden.

B. THE WATERS LYING EAST OF A STRAIGHT LINE RUNNING FROM THE SPANISH BANKS LOW-TIDE ELEVATION TO THE EAST CAPE OF CAPE SABLE DO NOT COMPRISE A JURIDICAL BAY

The Special Master determined that the waters lying east of a straight line running from Knight Key to the East Cape of Cape Sable comprise a juridical bay under Article 7 of the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. (Part 2) 1606, and therefore that the line constitutes the seaward limit of internal waters. The State agrees that a juridical bay exists but contends (Br. 57–58) that

the southern terminus of its closing line is further west, at the Spanish Banks low-tide elevation two miles northeast of Big Spanish Key.

We have shown, at pages 7 through 15 of our brief in support of the United States' exceptions, that the Special Master erred in finding a juridical bay. We undertake to show here only that, assuming *arguendo* the existence of such a bay, the closing line proposed by the State is nevertheless inappropriate.

The theory on which the Special Master apparently proceeded in finding a juridical bay was that the Florida Keys out to Knight Key are "so closely aligned with the mainland as to be deemed a part of it." *United States* v. *Louisiana, supra,* 394 U.S. at 67, n. 88. In the proceedings before the Special Master the State did not urge the closing line it now proposes. The Special Master nevertheless considered and rejected that closing line "because of the existence of a gap in the chain of the Keys just west of Knight Key, through which gap passes the Moser Channel between the Straits of Florida and the Gulf of Mexico with navigable depths of water of from 10 to 15 feet [;] * * * this navigable channel so far separates the lower Florida Keys from the upper Keys as to negate a finding that the former should be regarded as a further extension of the mainland" (Report, p. 47).

The State's position here apparently is that since a federal highway runs from the mainland to Key West, and "ocean-going vessels" (Br. 58) cannot navigate Moser Channel, the entire chain of Keys extending westward to Key West may be treated as

part of the mainland for purposes of establishing a juridical bay under Article 7 of the Convention. The United States, by limiting its territorial sea in this area to a three-mile belt measured from the natural shoreline (U.S. Ex. 101), has, in its dealings with foreign nations, implicitly rejected the State's argument with respect to the significance of highway bridges. Moreover, this Court has held that it is the geographic relationship of an island to the mainland, not the presence or absence of highway bridges, that determines whether the island may be considered part of the mainland under the Convention (*United States* v. *Louisiana, supra,* 394 U.S. at 66):

> * * * whether a particular island is to be treated as part of the mainland would depend on such factors as its size, its distance from the mainland, the depth and utility of the intervening waters, the shape of the island, and its relationship to the configuration or curvature of the coast.

The islands west of Knight Key cannot be considered part of the mainland under these criteria. As the State concedes (Br. 58), the most seaward of those islands, Key West, is over 100 highway miles from the mainland; and a water gap of more than 5 miles separates Bahia Key, the easternmost of the lower Keys, from Knight Key, the westernmost of the upper Keys. These distances are far too great to permit the lower Florida Keys to be realistically considered part of the mainland. Cf. *United States* v. *Louisiana, supra,* 394 U.S. at 66–67. Similarly, the water channels west of Knight Key, although not deep enough to accom-

modate truly large vessels, are nevertheless navigable by ocean-going fishing vessels; those channels therefore are of sufficient international significance to foreclose treatment of outlying islands as part of the mainland. Finally, the Keys constitute a fringe of islands projecting dramatically away from the mainland coast; their "relationship to the configuration or curvature of the coast" precludes their being considered part of the mainland.

But the closing line proposed by the State is in any event improper, even if the State is otherwise correct in its contention that islands linked to the mainland by a highway may realistically be considered part of the mainland for purposes of Article 7. The maximum closing line permitted by that Article is 24 miles, and the highway upon which the State relies does not pass through any island west of Knight Key from which a 24-mile closing line may be drawn. In an attempt to overcome this difficulty, the State has designated, as the headland of its proposed juridical bay, a low-tide elevation that lies two miles offshore from the nearest true island and more than three miles from the nearest island crossed by the highway. We have serious doubts whether a low-tide elevation may properly be considered the headland of a juridical bay. Cf. Article 4(3) of the Convention, prohibiting the construction of straight baselines to or from low-tide elevations. In any event, the comparatively isolated low-tide elevation chosen by the State in this case is not "so closely aligned with the mainland as to be deemed a part of it"; nor can it realistically be con-

sidered part of the chain of islands that are connected to the mainland by the highway. It cannot, therefore, properly be treated as the headland of a juridical bay. See *United States* v. *Louisiana, supra,* 394 U.S. at 60–66; see also pages 11 and 12 of our brief in support of the United States' exceptions. Indeed, there is no island or low-tide elevation west of Knight Key from which a satisfactory closing line could be drawn under Article 7. See page 10, note 3, of our brief in support of the United States' exceptions.

CONCLUSION

For the foregoing reasons, the State's exceptions to the Report of the Special Master should be overruled.

Respectfully submitted.

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AUGUST 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974

Supreme Court, U. S.
FILED
SEP 7 1974
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 52, Original

UNITED STATES OF AMERICA,
Plaintiff,

-v-

STATE OF FLORIDA,
Defendant

Florida's Response to Exceptions of the United States to the Report of the Special Master

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SUBJECT INDEX

Defendant's Response to Exceptions of the United States to the Report of the Special Master

Statement 1
Response to Exceptions 2
Argument: Point I – Florida Bay is an historic bay – the burden of proof imposed by the Special Master was inappropriate 3
1. A determination of the status of Florida Bay as juridical is a crucial limitation upon territory and initial sovereignty over the area 4
2. The "clear beyond doubt" test required by the Rule of *United States* vs. *California*, 381 U.S. 139 (1965), was clearly misapplied in the instant proceedings 8
3. Florida's boundaries "confirmed" and "restored" by the Submerged Lands Act were those boundaries described in its 1868 Constitution 12
Argument: Point II – the conduct of foreign affairs cannot excuse an attempt to diminish the territorial integrity of a state of the union . 15
Conclusion 19
Certificate of Service 20

TABLE OF AUTHORITIES

Cases

Bateman v. State, 238 So.2d 621 at 626-633 (1970) 10
Coyle v. Smith, 221 U.S. 559 (1910) 18
DeGeofroy v. Riggs, 133 U.S. 258 (1889) 17
Lane County v. Oregon, 7 Wall. (U.S.) 76 (1869) 18
Martin v. Waddell, 16 Peters (U.S.) 366 (1842) 15
Ohio v. Kentucky, 410 U.S. 641 (1973) 11
Pollard's Lessee v. Hagan, 3 How. (U.S.) 212 (1845) 16
Rhode Island v. Massachusetts, 14 Pet. (U.S.) 210 (1840) 11
Texas v. White, 7 Wall. (U.S.) 700 (1868) 15
United States v. California, 381 U.S. 139 (1965) 5,8,11,12
United States v. Florida, 363 U.S. 121 (1960) 12,13
United States v. Louisiana, 339 U.S. 699 (1950) 12
United States v. Texas, 339 U.S. 707 (1950) 12

Statutes and Treaties

33 U.S.C. §3 7
43 U.S.C. §§1301-1315 12,14

10 U.S.T. 1703, September 16, 1959 11
Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. (Part 2) 1606 17

FLORIDA STATUTES

Section 370.151(2), 1957 10
Section 370.151, 1961 10

Laws of Florida

Chapter 57-358, 1957 9

Other

Congressional Record-Senate, June 4, 1959, pg. 9846 10
Congressional Record-Senate, April 26, 1960, pg. 11191, Summary of Testimony of Arthur H. Dean, Special Consultant to the Department of State 3,18
Department of State Bulletin, April 26, 1959 10

IN THE
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Florida's Response to Exceptions of the United States to the Report of the Special Master

STATEMENT

The United States' exceptions to the Report of the Special Master question (a) his conclusion that waters east of a straight line between the East Cape of Cape Sable and Knight Key comprise a juridical bay and are inland waters of the State of Florida, and (b) his finding that narrow waters within each of three groups of islands in the lower Florida Keys are inland waters of the State of Florida.

The first objection is based solely upon foreign policy considerations, and the second is like unto it, but with added emphasis upon Federal priorities in establishing baselines to enclose archipelagoes.

Neither exception takes cognizance of the constitutional question presented by the Master's Report. Both exceptions candidly concede that the result reached by the Master is of little significance as a practical matter in treating with the subject geography since there is small moment in whether Florida's historic boundaries are measured from closing lines of a juridical bay or from the natural shorelines involved (U. S.

Exceptions, pg. 7), or whether the "island groups" involved are enclosed as determined by the Master or as determined using natural shorelines (U. S. Exceptions, p. 16). Neither Exception, admits the United States, substantially affects disposition of seabed rights in the case.

Yet, for reasons of a "larger international significance" (U. S. Exceptions, p. 7), and the unique "archipelagic principle involved" (U. S. Exceptions, p. 19), the United States urges that the Master be disregarded on these two points. Because Florida's historic boundaries and the Master's treatment of them give rise to some embarrassment in the conduct of foreign affairs (U. S. Exceptions, p. 18), Plaintiff insists that the Court must set the boundaries back.

As far as the United States is concerned, foreign affairs is the consideration *ne plus ultra*. This consideration is followed closely by concern for "national security" and "commercial shipping interests", in that order (U. S. Exception pp. 18-19).

Rights asserted by ten million citizens of the State of Florida based upon their historic concept of the geographical unit the United States Congress recognized and approved Florida to be, and other questions of the nature of State-National relations, are omitted from concern expressed by the United States and are conspicuous by their absence. In the name of foreign affairs, the National Government wants all or nothing from the Special Master. And, indeed, it appears on close consideration of the Report and United States' Exceptions to it, that the Special Master gave it all to them.

But, in the process, a couple of things were overlooked, both by the United States and by the Special Master. Their consideration, if considered at all, must affect conclusions of fact upon which the United States' arguments are advanced, and, consequentially, conclusions upon which the Special Master relied. These facts are discussed here for the first time, with permission of the United States obtained in advance.

RESPONSE

Florida's Response to Exceptions of the United States is, essentially, two-fold:

(a) That the juridical bay objection is well-founded, but for wrong reasons: Florida Bay, is, as previously pointed out, an historic bay. The United States and the Special Master have overlooked open acts of dominion exerted by both State and Federal authorities, and have consistently but erroneously maintained that there has been no recognition of Florida primacy by a foreign government, and

(b) That the "foreign affairs" premise for objections noted is a *non sequitur*, for the United States has no authority in the conduct of foreign affairs to bargain away the territory of a State.

I.

FLORIDA BAY IS AN HISTORIC BAY – THE BURDEN OF PROOF IMPOSED BY THE SPECIAL MASTER WAS INAPPROPRIATE.

> *"During the questioning by Senator Long, Mr. Dean made it clear that the Conventions do not affect the relative rights as between the several States of the United States and the Federal Government. The Conventions only affect the rights of the United States as a soverign state with respect to the rights of other sovereign states."*[1]

> *"In the Constitution the term "state" most frequently expressed the combined idea . . . of people, territory and government. A State, in the ordinary sense of the Constitution, is a political community of free citizens occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written Constitution, and established by the consent of the governed."*[2]

In its opening sentence of Argument, the United States describes two essential differences between positions of the parties here. (U. S. Exceptions, p. 7; emphasis supplied):

[1]Summary of testimony of Mr. Arthur H. Dean, Special Consultant to the Department of State, who was Chief of the U. S. Delegation at the negotiations in Geneva which resulted in the Convention on the Territorial Sea and the Contiguous Zone and the Convention on the High Seas; from Congressional Record-Senate, April 26, 1960, pg. 11191.

[2]Chief Justice Chase speaking for the Court in *Texas* vs. *White*, 7 Wall. (U.S.) 700 at p. 721 (1868).

The determination whether Florida Bay is a juridical bay constituting inland waters of the State of Florida *has little importance to the final determination of the respective seabed rights* of the United States and the State *under the Submerged Lands Act.*

1.

First, a determination of the status of Florida Bay as *juridical* is, by definition, a crucial limitation upon territory, and hence, initial sovereignty over the area. To suggest that such a determination has "little importance" to respective rights involved is to ignore the core issue.

Florida's position is that Florida Bay, delimited in the State's 1868 Constitution, is an *historic* bay; not a *juridical* bay. Therefore, the limitations attendant to juridical bays (i.e., 24-mile closing lines, well-marked coastal indentations, land-locked waters, and other limitations discussed in the Master's Report, pp. 36-47 and in the United States' Exceptions, pp. 7-15) should not be imposed upon State territory here considered (See Florida Exceptions, pp. 31-57).

The Master's characterization of Florida Bay as something less than an historic bay is, to a large extent, what this case is about. To insist that Florida Bay lacks credentials of historical status is to flatly deny more than 100 years of history.

The United States relies confidently upon the Master's finding (at p. 42 of the Report) that since the United States has itself disclaimed sovereign jurisdiction over the area, the State of Florida was obliged to establish by historic evidence "clear beyond doubt" that its historic claims met the three criteria set by the Master (at p. 41 of the Report). The United States, further, relies strongly upon the Master's Conclusion (at p. 46 of the Report) that since Florida failed to come forward and present evidence "clear beyond doubt", its claim to Florida Bay as an historic bay must be denied. Taking as a foregone conclusion, in view of the Report, that Florida Bay is not what Florida urges it to be (which it is), but is, as a matter of law, that which the Master says that it is (which it isn't), the United States attacks the Master's conclusion that it is a juridical bay,

and ignores the Master's errors in avoiding the historic nature of the place. And the United States does it all in the name of foreign affairs.

> In the conduct of its foreign affairs, the United States treats the waters of Florida Bay as territorial seas or international waters. (U. S. Exceptions, p. 7).

It treats as territorial seas, according to its Exceptions and previous arguments to the Master, only three miles measured from mainland islands and certain low-tide elevations along the Bay (U. S. Exceptions, p. 7). The rest of Florida Bay it treats, ostensibly, as high seas.

> ***Approval of the Special Master's determination of the existence of a juridical bay would extend the United States' claim unto *waters previously treated as high seas*, and it would imply adoption by the United States of a principle permitting one side of a bay to be formed by a chain of islands. (U. S. Exceptions, p. 8; emphasis supplied.)

It was this assertion, that the United States had neither exercised nor claimed any dominion in Florida Bay, that prompted the Master to apply the California II Rule[3] subjecting Florida to the "clear beyond doubt" test.

In the present case, the United States takes the position that it has disclaimed any historic title to or sovereign jurisdiction over the extensive area which the State of Florida claims as Florida Bay.

> In *United States* vs. *California* ... the disclaimer of the United States in the litigation itself was held sufficient to bar the state claim. Here there is not only disclaimer in the litigation but additional evidence of activities and statements by officials of the United States of continued disclaimers of historic title to the waters in question.

[3] *United States* v. *California*, 381 U.S. 139 at 175 (1965) "We are reluctant to hold that such a disclaimer [of the United States] would be decisive in all circumstances, for a case might arise in which the historic evidence was clear beyond doubt. But, in the case before us, with its questionable evidence of continuous and exclusive assertions of dominion over the disputed waters, we think the disclaimer decisive.

> ***The State must show that it, *or the United States*, exercised open, notorious, and effective sovereign authority in the area as against the nationals of foreign states and that the foreign states acquiesced in this exercise of authority. As to this, the evidence submitted by the State is limited indeed. *There is no evidence whatever that the federal government either claimed or exercised such authority over the area beyond the Coastal belt of territorial sea* recognized by maritime states. (Report, pp. 42-43; emphasis supplied).

Neither the United States, in making such averments, nor the Special Master, in relying thereon, considered carefully all the evidence before them. Nor, it is admitted, did Florida make the point which is so amplified by the Master's Report. But the Court's attention is respectfully invited to Florida's Exhibit #168, a Coastal & Geodetic Survey chart of the Florida Keys showing the mainland, the Keys running out to and including the Tortugas, and a straight line added to the printed chart plotted at an angle of 045° from the Tortugas to Cape Romano back on the mainland. The area claimed as an historic bay is clearly shown.

In Florida Bay, two rectangular boxes are described. One, the smaller one, for which the chart was submitted as evidence of an area under a state-granted oil drilling lease, is marked by heavy lines drawn on the chart for that purpose and lies adjacent to the Tortugas-Romano line at the top of the triangular-shaped Bay. The other, overlooked by the parties, and apparently by the Master, is printed on the chart in lighter, broken lines. It is considerably larger than the former, and could be said to dominate the central, navigable area of Florida Bay. It is marked, rather clearly, in the center of the rectangle: "DANGER AREA (see note)." The "Note", also shown on the Exhibit, is clear and unambiguous. It reads:

> DANGER AREA
>
> The area within the following limits is not to be entered without U.S. Naval authority. Between parallels 24° 36′ N, 25° 10′ N. Between meridians 81° 23′ W, 82° 10′ W.

At page 43 of his Report, the Master observed:

> The most common exercise of sovereignty in inland waters is the special control and, often, prohibition of navigation by

foreign vessels and of fishing by foreign nationals. The State of Florida offered no evidence that either it or the federal government had ever attempted to control or prohibit the mere navigation by foreign vessels of the area in question.

It would seem that a Danger Area so marked upon a navigation chart appearing on Florida's Exhibit #168, showing an area of Florida Bay of approximately 1,900 square miles closed to navigation without prior permission of the United States Navy, would indicate a "common exercise of sovereignty", clearly within the Special Master's own definition. Moreover, it patently refutes the United States' claim throughout these proceedings (stated unequivocally on page 8 of its Exceptions) that it treats these waters as high seas. This claim, it is respectfully submitted, is erroneous. For authority to so designate danger areas, 33 U.S.C. § 3, limits such regulation to "navigable waters of the United States or waters under the jurisdiction of the United States . . ."

The Court's attention is respectfully invited to the Appendix where recent correspondence between the State and Department of the Army is reproduced together with appropriate danger zone regulations which are self-explanatory. Of particular relevance is the area described under Regulation 204.85c shown on the chart at Appendix 17 supplied by the Department of the Army.

Whether this apparent exercise by the National Government of dominion over a substantial part of Florida Bay indicates a reliance on Florida's historic claim to the area, or whether it is based upon some other unannounced authority, is not material to the issue at this point. But the fact of this act of dominion *is* material to the United States' assertion that it has historically treated the area as high seas, and it should be of some significance to the question of whether the Special Master's denial of the historical bay status should be accepted by this Court, overruled by this Court, or resubmitted to the Master for further consideration.

Since the Federal Government *has*, in fact, asserted dominion in Florida Bay, the "clear beyond doubt" test of evidence to which the Master held Florida in presenting its case must be ruled in error.

In its Exceptions, the United States challenges the Master's conclusion that Florida Bay is a juridical bay for reason that such result would be contrary to foreign policy. Florida challenges the Master's juridical bay determination for reason that such result would be contrary to and an arbitrary limitation upon the area's nature as an historical bay.

2.

Accepting the criteria for approving historic bays announced by this Court in *United States* vs. *California*, 381 U.S. 139 at 172 (1965), to be "bays over which a coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations", or the even more restrictive criteria demanded by the Special Master (Report, p. 41), Florida's position is not without support.

The Master determined the 1868 Constitution to have been remote enough in time to satisfy his second criterion: that the exercise of authority over the area have continued for a considerable period, but refused to accept Florida's construction of the boundary language contained in that Constitution, contending that (a) the directional call "thence northeastwardly to a point three leagues from the mainland" does not mean what it says (Report pp. 24-26); (b) the boundary line set at 045° from a point three leagues north of the Tortugas straight across the Bay of Florida to a point three leagues from Cape Romano asserted by the State of Florida would encompass an area of comparatively deep water deemed by the United States to be a high seas region in which no dominion had been asserted, either by the United States or Florida (Report, pp. 26-27); and (c) the opinion of this Court in No. 9 Original (363 U.S. 121) and the decree entered in that case (364 U.S. 502), by construing the Submerged Lands Act as a limitation upon Florida's historic boundary claim, effectively adjudicated the issue of Florida Bay.

Assuming that the Master's principle objections to Florida's claim can be overcome by reconsideration of evidence indicating open acts of dominion by the United States (as discussed under Part 1, above), we turn to another primary difficulty expressed

by the Master in his consideration of Florida Bay as historic inland waters:

> [F]oreign states must have acquiesced in the exercise of this authority as against their nationals. (Report, p. 41)

> The State must show that it, or the United States, exercised open, notorious and effective sovereign authority in the area as against the nationals of foreign states *and that the foreign states acquiesced in this exercise of authority.* (Report, pp. 42-43, emphasis supplied.)

As to whether the State exercised open authority over the area of Florida Bay claimed, and whether foreign states acquiesced in such exercise of authority, the Master commented, at p. 43:

> As to this, the evidence submitted by the State is limited indeed.

There then followed a recitation of evidence offered by Florida to describe its exercise of open authority, most of which is treated with less than enthusiastic approval by the Special Master, and dismissed as inappropriate for reasons indicated. As regards Chapter 57-358, Laws of Florida, 1957, however, the Master had no comment. (Report pp. 44-45). But, while the Master was indifferent to Florida's 1957 legislation, the Executive Department and Senate of the United States were not so silent, at least on the subject matter of the Act: the Tortugas shrimp beds.

From 1950 to 1956, the area of Florida Bay, the Gulf of Mexico and Straits of Florida known as the Tortugas shrimp beds yielded $38 million worth of shrimp to fishermen, most of whom operated out of Florida and Cuban ports. After indications in 1955 that a large proportion of the shrimp catch was undersized, the State of Florida acted unilaterally to conserve resources in the Tortugas beds by passing Chapter 57-358, Laws of Florida, 1957. (At that time, the legislature met biannually. It may be said, therefore, that the conservation area was established as quickly as possible after the need for such measures became known.)

The 1957 Act defined the Tortugas shrimp beds as follows (§ 370.151(2), Florida Statutes, 1957):

> Beginning at the intersection of the Florida boundary line in the Straits of Florida with the meridian longitude 82°00′ West of Greenwich; running thence westerly along said Florida boundary line in the Straits of Florida to the meridian longitude 82°35′ West of Greenwich; running thence due North along said meridian longitude 82°35′ to its intersection with the Florida boundary line in the Gulf of Mexico, which is a straight line drawn from the island of Dry Tortugas on a bearing of 75° from magnetic north; running thence easterly along said Florida boundary line to its intersection with said meridian longitude 82°00′; running thence Southerly along said meridian longitude 82°00′ to the point of beginning.

The Act gave the Director of the State Department of Conservation discretionary authority to close the shrimp beds to vessels flying the American flag. The Act was subsequently amended to increase the size of the Tortugas shrimp beds to an area almost co-extensive with Florida Bay (§ 370.151, Florida Statutes, 1961). Enforcement activity under the legislation is described, in part, in Justice Ervin's dissent in *Bateman* vs. *State*, 238 So.2d 621 at 626-633 (1970).

Seeking Cuban cooperation to protect these shrimp conservation areas, industry spokesmen sought and obtained intergovernmental conferences involving officials of the Department of State, Department of Interior, State of Florida, and other interested groups. Negotiations between the governments of Cuba and the United States followed. A convention was drafted. Florida state legislative and conservation officials were consulted. They gave their concurrence to the convention.

President Eisenhower transmitted the Convention to the Senate for its advice and consent March 5, 1959. (Department of State Bulletin, April 26, 1959). Senator Fulbright moved the Senate's advice and consent to ratification. (Congressional Record – Senate, June 4, 1959, page 9846). The following extract is from his statement to the Senate; emphasis supplied:

> The Committee on Foreign Relations heard testimony from representatives of the Departments of State and Interior, and

> received written statements of support from four organizations representing business interests in six Southern States. It was noted that Florida State legislative and conservation officials were consulted and gave their concurrence on the convention. The Committee further noted that Cuba had promptly ratified the convention, *and had carefully observed a "gentlemen's agreement" regarding Florida's regulations pending ratification by the United States.*

Ratification was advised by the Senate on June 4, 1959. The convention was ratified by President Eisenhower June 12, 1959; by Cuba July 29, 1959; and the ratifications were exchanged September 4, 1959, making the treaty effective and in force as of that date. It was proclaimed by the President September 16, 1959 (10 U.S.T. 1703).

The fact of the convention is not, of course, controlling. But, the statement by Senator Fulbright that the Cuban government "carefully observed a 'gentlemen's agreement' regarding Florida regulations" is material to the issue as to whether a foreign state recognized Florida's assertion of authority in the area described by its 1868 Constitution as inland waters of the State.

Under the circumstances described by evidence of (a) United States' acts of dominion in closing vast areas of Florida Bay to navigation; (b) Florida's shrimp conservation regulations in the area (to say nothing of mineral leasing and other acts of sovereignty presented to the Master earlier in these proceedings); and (c) Cuba's acknowledgment of Florida's regulatory authority, it is respectfully submitted that this Court, in the exercise of its equity powers in cases of original jurisdiction [*Ohio* vs. *Kentucky*, 410 U.S. 641 (1973); *Rhode Island* vs. *Massachusetts*, 14 Pet. (U.S. 210 (1840)] should remand this cause to the Master for consideration of the evidence in light of a lesser burden of proof to be imposed upon the State of Florida in establishing its inland sea boundaries as defined in the 1868 Constitution.

The "clear beyond doubt" test required by the Rule of *United States* vs. *California*, 381 U.S. 139 (1965), was clearly misapplied in the instant proceedings.

3.

The second point of difference between the parties which is described in the opening sentence of the United States' Argument (U.S. Exceptions, p. 7), is the Plaintiff's apparent reliance upon the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. § 1301-1315, as a controlling limitation upon the territory that is the State of Florida. The Act is not controlling (a) by its terms, and (b) because the Congress has no power to divest a State of its territory once that territory has been approved (i) in its admission Constitution, or (ii) by law subsequent to its admission.

In *United States* vs. *Florida*, 363 U.S. 121 (1960), this Court discussed the matter, treating the Submerged Lands Act not so much as a *grant of territory* as the grant of an opportunity to prove historic boundaries; not so much a conveyance of new land to the State as it was the *chance to demonstrate* that the geographical unit that comprises the territory of the State of Florida does not stop at the shoreline.

The suit was cast in terms of limited definition: whether Florida could prove historic boundaries three marine leagues seaward of her beaches in the Gulf of Mexico.

> ***The language of the Submerged Lands Act was at least in part designed to give Florida an opportunity to prove its right to adjacent submerged lands so as to remedy what the Congress evidently felt had been an injustice to Florida. Upon proof that Florida's claims met the statutory standard – "boundaries. . . . heretofore approved by the Congress" – the Act was intended to "confirm" and "restore" the three-league ownership Florida had claimed as its own so long and which claim this Court had in effect rejected in *United States* v. *Texas*, 339 U.S. 707; *United States* v. *Louisiana*, 339 U.S. 699; and *United States* v. *California*. As previously shown, Congress in 1868 did approve Florida's claim to a boundary three leagues from its shores.*** (363 U.S. at 128)

The separate concurring opinion by Mr. Justice Frankfurter adds emphasis:

> The one thing which I take to be incontestable is that Congress did not, by the Submerged Lands Act of 1953,

> make an outright grant to any of the Gulf States in excess of three miles. Congress only granted to each of these States the opportunity to establish at law that it possessed a boundary in excess of three miles, either by virtue of possession of such a boundary at the time of its admission to the Union or by virtue of Congressional "approval" of such a boundary prior to the enactment of the Submerged Lands Act.*** (363 U.S. at 129-310)

Thus, the controlling question is not whether Congress granted Florida a seaward boundary in the Submerged Lands Act, but whether Florida demonstrated an historic claim to boundaries beyond the three-mile limit in accordance with criteria outlined in the Act.

The Court ruled that Florida had demonstrated its historic claim by finding (a) that the State's 1868 Constitution had described seaward boundaries, and (b) that in the Admission Act of June 25, 1868, Congress approved them in response to requirements of the Reconstruction Acts of March 2 and March 23, 1867.

In so finding, the Court expressly overruled the United States' assertion that the Congress had not made careful scrutiny of the boundaries described in the Readmission Constitution.

> ***We cannot know, for sure, whether all or any of the Congressmen or Senators gave special attention to Florida's boundary description. We are sure, however, that this Constitution was examined and approved as a whole, regardless of how thorough that examination may have been, and we think that the 1953 Submerged Lands Act requires no more than this. Moreover, the Hearings and the Reports on the Submerged Lands Act show, as the Government's brief concedes, that those who wrote into that measure a provision whereby a State was granted up to three leagues if such a boundary had been "heretofore approved by Congress", had their minds specifically focused on Florida's claim based on submission of its 1868 Constitution to Congress.***

Florida's boundaries "confirmed" and "restored", then, by the Submerged Lands Act were those boundaries described in

its 1868 Constitution. They did not *originate* in 1953. They have been what they are for more than 100 years. And they extend, in places, more than three miles from the coastline into the Atlantic and more than three marine leagues from the beach in the Gulf.

The same boundary description approved by Congress and this Court speaks of Florida's territory extending "thence southwestwardly along the edge of the Gulf Stream and Florida Reefs to and including the Tortugas Islands . . ." There is no interruption in this call. It is a continuous line, without provision for "upper keys" or "lower keys" or island clusters severed from territorial continuity by virtue of channel depth or distance between low-tide elevations. Moreover, the seaward edge of the reef-line falls outside the three-mile limit, and the distance between the Dry Tortugas and Marquesas is in excess of six marine leagues. Does this mean that the boundary description recited above does not mean what it says, or that the territory of Florida is something less than described in its 1868 Constitution? The United States and the Special Master answer both questions affirmatively because they interpret the Submerged Lands Act to be a territorial grant. (Report, pp. 29-36; Exceptions, pp. 2, 15, 17).

If one accepts the premise that Florida's seaward boundaries originated in 1953, then the United States and the Special Master are correct and the State's case must be denied.

But, if one accepts the premise that Florida's seaward boundaries originated in 1868 – as approved by Congress – then the United States and the Special Master are in error when they seek to apply the 1953 Act as a limitation, shrinking Florida down to size consistent with a three-mile by three-league mold.

If there is any dilemma posed by these premises (and Florida respectfully submits that, since this Court's Opinion in No. 9 Original, there is scant reason to insist that, for purposes of these proceedings, the Submerged Lands Act is a territorial grant) wording of 43 U.S.C. § 1312 is helpful to show that the intent of Congress was not to assert an impermissible power to attempt the transfer of part of a state to the Federal or international maritime domain.

***Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its Constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress."

Thus, by its terms, the Submerged Lands Act makes room for historic boundaries which, like Florida's, rise seaward of the 3-mile or 3-league limits.

Any other interpretation of the Submerged Lands Act would be constitutionally unsound, unless it is suggested that Congress has power to dismember the States. Surely, an Act of Congress expressly lopping off the Keys from the State of Florida would be void and of no effect.

Either that, or the States and the Union of them, are something less than "indestructible." *Texas* v. *White*, 7 Wall. (U.S.) 700, 725 (1869). How, then, can it be posed that Congress impliedly intersected slices out of the Keys by quit-claiming a limited strip of territorial seabed to all coastal states in the Submerged Lands Act? It has not been argued that Congress has this power. Yet, the exercise of such power is necessary to the result.

II

THE CONDUCT OF FOREIGN AFFAIRS CANNOT EXCUSE AN ATTEMPT TO DIMINISH THE TERRITORIAL INTEGRITY OF A STATE OF THE UNION.

"When the Revolution took place, the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the Constitution."[4]

[4]Chief Justice Taney delivering the Opinion of the Court in *Martin* vs. *Waddell*, 16 Peters (U.S.) 366 at 410 (1842).

> *"***To give to the United States the right to transfer the title to the shores, and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of State sovereignty, and deprive the States of the power to exercise a numerous and important class of police powers."*[5]

Throughout these proceedings, the United States' concern for its position with regard to foreign affairs has been paramount. It is the "international significance" of the Master's determination that Florida Bay is a juridical bay that brings exception from the Complainant, not the practical effect of such a finding vis-a-vis mineral rights.

The issue is framed in terms of international law, and arguments posed by the United States are arguments more appropriately made in some international court between disputing nations. An example is at page 12 of the United States Exceptions, where, from the Government's "foreign affairs" point of view, the issue controlling the Master's juridical bay finding is crystalized:

> ***The question here is not whether the headland of a bay may be located on an island, but rather whether a juridical bay may be formed by a fringe of islands projecting out from a generally flat or convex mainland.

In all due respect to the United States, it is submitted that reliance upon international law or conventions or the implementation of foreign affairs is not material to the core issue. Such considerations are only peripheral to the center of our controversy and obscure the nature of the case.

There is nothing in the record to indicate that innocent passage of foreign shipping is, in fact, frustrated by Defendant's assertion that the Keys out to and including the Tortugas constitute an integral part of the State of Florida. Nor is there any evidence that innocent passage in the area between the Keys and the mainland, denominated Florida Bay, has been or will be denied should the area be found to be an historic bay constituting inland waters of the State of Florida.

[5]Mr. Justice McKinley delivering the Opinion of the Court in *Pollard's Lessee* vs. *Hagan*, 3 How. (U.S.) 212 at 230 (1845).

While the State is in sympathy with the United States in all problems involving international relations, it is respectfully submitted that decisions by Indonesia and the Phillipines to draw baselines connecting their outer islands cannot affect the outcome of a domestic dispute between the United States and Florida over location of the State's seaward boundary.

If, as Florida urges, it can be demonstrated by a reasonable preponderance of the evidence, that Florida Bay is an historic bay, then exceptions raised and discussed by the United States will be deemed moot. But if not, if the Court sustains the Master despite evidence discussed here that he applied an unfair and unwarranted evidentiary burden, then it is respectfully submitted that foreign policy considerations are secondary to considerations of Federal-State relations at issue here. The position of the United States as to disapproving use of baselines to connect Indonesian islands may change overnight (as, indeed, certain United States' positions vis-a-vis territorial sea, contiguous zone and high seas have dramatically changed during the presently on-going Law of the Sea Conference), but the state-federal balance sought during this continuing process of developing a more perfect Union is a permanent and unyielding demand upon all of us.

Certainly, if Florida Bay is an historic bay and, hence, part of the inland waters of the State, foreign policy considerations would hardly justify application of closing lines as required by the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. (Part 2) 1606 (See, U. S. Exceptions, pp. 9, 16-17). To suggest that inland waters of the State can be annexed to the Federal or international maritime domain because of their *navigability* or for reason of foreign policy considerations in another part of the world is to suggest a *non sequitur* and to deny lessons of previous cases. In *DeGeofroy* vs. *Riggs*, 133 U.S. 258, (1889), dictum at page 267 instructs against use of treaty power to violate State sovereignty.

> ***The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or its departments, and those arising from the nature of the

> government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter without its consent.***

This is certainly not new. The territorial and political integrity of states have been challenged before and upheld by this Court. If the State of Florida is "endowed with all the functions essential to separate and independent existence", *Lane County* v. *Oregon*, 7 Wall. (U.S.) 76 (1869), then neither the Congress via legislation nor the Executive Department via international treaty may diminish State territorial sovereignty. If they can, paraphrasing Mr. Justice Lurton in *Coyle* vs. *Smith*, 221 U. S. 559 at 580 (1910), an 'equal footing doctrine' case, then the Union will not be the Union of the Constitution.

Thus, when the United States excepts to the Master's conclusions for reasons of law according to the Convention on the Territorial Sea and the Contiguous Zone, it again raises the shadow of a *non sequitur*, for decisions divesting Florida of its territory cannot be so founded.

It is clear from reports to the Senate Committee on Foreign Relations by Mr. Arthur H. Dean, special consultant to the Department of State, who was Chief of the United States delegation at the negotiations in Geneva which resulted in the Convention on the Territorial Sea, that the Convention was not meant to affect relative rights as between the several states of the United States and the Federal Government, but was only to affect the rights of the United States as a sovereign state with respect to the rights of other sovereign states. (See, Congressional Record-Senate, April 26, 1960, page 11191). Florida's stipulation agreeing with the United States that 'pertinent sections' of the Convention would govern determination of Florida's coastline was entered into in good faith to seek a common ground, particularly of definitions, where they seemed appropriate. It was not meant as a surrender to an international view of this controversy. Nor by such stipulation could counsel for these parties endow the Conventions with a force and a relevance never accorded them by their architects.

CONCLUSION

It should be noted that the essential nature of evidence argued herein, i.e. the danger zone regulations demonstrating definitive acts of United States' sovereignty in Florida Bay, and Senator Fulbright's report to the Senate that the Cuban government had acquiesced in observing Florida's shrimp conservation regulations in Florida Bay, has not been put squarely to the Master in argument, and that the United States has not had opportunity to comment about these specific matters. They appear in this Brief by consent of the United States conveyed to the undersigned.

In view of this evidence, it would be difficult to maintain a position grounded on an absence of acts of dominion by the United States in Florida Bay. Thus, the California II Rule of evidence should not have been imposed upon Florida.

Inasmuch as the United States has had no opportunity to respond to this material, it is Florida's position that this matter should be remanded to the Special Master for consideration of the evidence under a different test than that thus far imposed.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General

DANIEL S. DEARING
Chief Trial Counsel

August, 1974

Department of Legal Affairs
725 South Calhoun Street
Bloxham Building
Tallahassee, Florida 32304

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing Response to Exceptions of the United States to the Report of the Special Master filed by Defendant, STATE OF FLORIDA, have been served upon Robert H. Bork, Solicitor General of the United States of America; and Michael W. Reed, Esq., Department of Justice, Washington, D.C., 20530, Attorneys for Plaintiff; and Brice M. Clagett, Esq., Covington & Burling, 888 Sixteenth Street, N.W., Washington, D.C., 20006, Attorneys for Amici Curiae, by United States Mail this 8th day of August, 1974.

DANIEL S. DEARING
Chief Trial Counsel
Attorney for Defendant,
STATE OF FLORIDA.

SUPREME COURT, U. S.
FILED
SEP 7 1974
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 52, Original

UNITED STATES OF AMERICA,
Plaintiff,

-v-

STATE OF FLORIDA,
Defendant

Florida's Response to Exceptions of the United States to the Report of the Special Master

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APPENDIX

APPENDIX

DEPARTMENT OF THE ARMY
JACKSONVILLE DISTRICT, CORPS OF ENGINEERS
P. O. BOX 4970
JACKSONVILLE, FLORIDA 32201

SAJSP

24 July 1974

Honorable Thomas A. Harris
Assistant Attorney General
Department of Legal Affairs
Civil Division
Capitol Building
Tallahassee, Florida 32304

RECEIVED
JUL 25 1974
ATTORNEY GENERAL'S OFFICE

Dear Mr. Harris:

Reference is made to the telephone conversation with Mrs. Claydon, this office, on 22 July 1974 in which you requested regulations promulgated in Florida Bay.

Our records show that only three regulations were established in this area. Copies are inclosed.

As you will note, Danger Area 204.95 was formerly designated 204.85c and has been amended several times. Danger Area 204.86 was established 29 December 1948 and revoked 16 July 1973. Restricted Area 207.173a was established 7 April 1969.

It is hoped this will serve your need.

Sincerely yours,

Joseph T. Fascata
FOR

3 Incl
As stated

B. N. GOODE
Chief, Regulatory Branch

APPENDIX 1

DEPARTMENT OF THE ARMY
Jacksonville District, Corps of Engineers
P. O. Box 4970
Jacksonville, Florida 32201

Current Regulations

SAJSP Danger Zone Regulations 24 October 1966

TITLE 33-NAVIGATION AND NAVIGABLE WATERS
CHAPTER II-CORPS OF ENGINEERS, DEPARTMENT OF THE ARMY
PART 204 -- DANGER ZONE REGULATIONS
STRAITS OF FLORIDA AND FLORIDA BAY, FLA.

Pursuant to the provisions of Section 7 of the River and Harbor Act of August 8, 1917 (40 Stat. 266; 33 U.S.C. 1) Section 204.95 establishing and governing the use and navigation of danger zones in the Straits of Florida and Florida Bay, Florida, is hereby amended with respect to subparagraph (a)(2), revoking one of the danger zones in subdivision (iii), effective 30 days after publication in the FEDERAL REGISTER as follows:

204.95 Straits of Florida and Florida Bay in vicinity of Key West, Fla.; operational training area, aerial gunnery range, and bombing and strafing target areas, Naval Air Station, Key West, Florida.

(a) The danger zones.

(1) Operational training area. Waters of the Straits of Florida and Gulf of Mexico southwest, west and northwest of Key West bounded as follows: Beginning at latitude 25°45'00", longitude 82°07'00"; thence southeast to latitude 24°49'00", longitude 81°55'00"; thence southwest to latitude 24°37'30", longitude 82°00'30"; thence westerly to latitude 24°37'30", longitude 82°06'00"; thence southerly to latitude 24°28'30", longitude 82°06'00"; thence southerly to latitude 24°25'00", longitude 82°06'30"; thence easterly to latitude 24°25'00", longitude 81°57'00"; thence southwesterly to latitude 23°30'00", longitude 82°19'00"; thence westerly to latitude 23°30'00", longitude 82°46'00"; thence northwesterly to latitude 23°52'30", longitude 83°11'00"; thence northerly to latitude 24°25'00", longitude 83°11'00"; thence easterly to latitude 24°25'00", longitude 83°08'00"; thence clockwise along the arc of a circle with a radius of 92 miles centered at latitude 24°35'00", longitude 81°41'15" to latitude 25°45'05", longitude 82°23'30"; thence east to point of beginning.

(2) Aerial gunnery range. (Previously revoked).

(3) Bombing and strafing target areas. (i) A circular area immediately west of Marquesas Keys with a radius of two nautical miles having its center at latitude 24°33.4' and longitude 82°10.9', not to include land area and area within Marquesas Keys. The target located within this area, a grounded LSIL will be used for bombing and aircraft rocket exercises.

(ii) A circular area located directly west of Marquesas Keys with a radius of three statute miles having its center at latitude 24°35.6' and longitude 82°11.6', not to include land area within Marquesas Keys. The targets located within this area, pile-mounted platform, will be used as high altitude horizontal bombing range utilizing live ordnance up to and including 1,800 pounds of high explosives. In general, these explosives will be of an air-burst type, above 1,500 feet.

APPENDIX 2

(iii) A circular area located west of Marquesas Keys with a radius of two nautical miles having its center at latitude 24°34'30" and longitude 82°14'00".

(b) The regulations. (1) In advance of scheduled air or surface operations which, in the opinion of the enforcing agency, may be dangerous to watercraft, appropriate warnings will be issued to navigation interests through official government and civilian channels or in such other manner as the District Engineer, Corps of Engineers, Jacksonville, Florida, may direct. Such warnings will specify the location, type, time, and duration of operations, and give such other pertinent information as may be required in the interests of safety.

(2) Watercraft shall not be prohibited from passing through the operational training area except when the operations being conducted are of such nature that the exclusion of watercraft is required in the interest of safety or for accomplishment of the mission, or is considered important to the national security.

(3) When the warning to navigation interests states that bombing and strafing operations will take place over the designated target areas or that other operations hazardous to watercraft are proposed to be conducted in a specifically described portion of the overall area, all watercraft will be excluded from the target area or otherwise described zone of operations and no vessel shall enter or remain therein during the period operations are in progress.

(4) Aircraft and naval vessels conducting operations in any part of the operational training area will exercise caution in order not to endanger watercraft. Operations which may be dangerous to watercraft will not be conducted without first ascertaining that the zone of operations is clear. Any vessel in the zone of operations will be warned to leave and upon being so warned the vessel shall leave immediately.

(5) The regulations in this section shall be enforced by the Commandant, Sixth Naval District, Charleston, S. C., and such agencies as he may designate.

Approved: 26 Sep 1966

/s/ Stanley R. Resor
Secretary of the Army

NOTE: The danger areas described in paragraph (a)(1) and subparagraphs (i) and (ii) hereinabove are still active and subject to bombing and rocket firing therein at any time upon proper notice.

These rules and regulations will be in full force and effect 30 days after publication in the FEDERAL REGISTER. They were published in the FEDERAL REGISTER on 11 October 1966; public notices of their approval were sent to all known interested parties on 23 October 1966; they have been posted at post offices and other public places.

APPENDIX 3

U. S. ARMY ENGINEER DISTRICT, JACKSONVILLE
CORPS OF ENGINEERS
575 RIVERSIDE AVENUE
JACKSONVILLE 2, FLORIDA

Amended
Sec 24 Oct 66

SAKSP Danger Zone Regulations 23 March 1962

PART 204--DANGER ZONE REGULATIONS

STRAITS OF FLORIDA AND FLORIDA BAY, FLA.

Pursuant to the provisions of Section 7 of the River and Harbor Act of August 8, 1917 (40 Stat. 266; 33 U.S.C. 1), Section 204.95 establishing and governing the use and navigation of danger zones in the Straits of Florida and Florida Bay, Florida, is hereby amended prescribing paragraph (a) (3) (iii) to establish two additional bombing and strafing areas and revising paragraphs (b) (1) through (b) (4) to clarify the restrictions on the use of the areas, effective 30 days after publication in the FEDERAL REGISTER, as follows:

204.95 Straits of Florida and Florida Bay in vicinity of Key West, Fla.; operational training area, aerial gunnery range, and bombing and strafing target areas, Naval Air Station, Key West, Florida. (a) The danger zones. (1) Operational training area. Waters of the Straits of Florida and Gulf of Mexico southwest, west and northwest of Key West bounded as follows: Beginning at latitude 25°45'00", longitude 82°07'00"; thence southeast to latitude 24°49'00", longitude 81°55'00"; thence southwest to latitude 24°37'30", longitude 82°00'30"; thence westerly to latitude 24°37'30", longitude 82°06'00"; thence southerly to latitude 24°28'30", longitude 82°06'00"; thence southerly to latitude 24°25'00", longitude 82°06'30"; thence easterly to latitude 24°25'00", longitude 81°57'00"; thence southwesterly to latitude 23°30'00", longitude 82°19'00"; thence westerly to latitude 23°30'00", longitude 82°46'00"; thence northwesterly to latitude 23°52'30", longitude 83°11'00"; thence northerly to latitude 24°25'00", longitude 83°11'00"; thence easterly to latitude 24°25'00", longitude 83°08'00"; thence clockwise along the arc of a circle with a radius of 92 miles centered at latitude 24°35'00", longitude 81°41'15" to latitude 25°45'05", longitude 82°23'30"; thence east to point of beginning.

(2) Aerial gunnery range. (Previously revoked).

(3) Bombing and strafing target areas. (i) A circular area immediately west of Marquesas Keys with a radius of two nautical miles having its center at latitude 24°33.4' and longitude 82°10.9', not to include land area and area within Marquesas Keys. The target located within this area, a grounded LSIL will be used for bombing and aircraft rocket exercises.

(ii) A circular area located directly west of Marquesas Keys with a radius of three statute miles having its center at latitude 24°35.6' and longitude 82°11.6', not to include land area within Marquesas Keys. The targets located within this area, pile-mounted platform, will be used as high altitude horizontal bombing range utilizing live ordnance up to and including 1,800 pounds of high explosives. In general, these explosives will be of an air-burst type, above 1,500 feet.

APPENDIX 4

(iii) Two circular areas located west of Marqueses Keys each with a radius of two nautical miles, one having its center at latitude 24°34'30" and longitude 82°14'00", and the other having its center at latitude 24°34'30" and longitude 82°24'00".

(b) The regulations. (1) In advance of scheduled air or surface operations which, in the opinion of the enforcing agency, may be dangerous to watercraft, appropriate warnings will be issued to navigation interests through official government and civilian channels or in such other manner as the District Engineer, Corps of Engineers, Jacksonville, Florida, may direct. Such warnings will specify the location, type, time, and duration of operations, and give such other pertinent information as may be required in the interests of safety.

(2) Watercraft shall not be prohibited from passing through the operational training area except when the operations being conducted are of such nature that the exclusion of watercraft is required in the interest of safety or for accomplishment of the mission, or is considered important to the national security.

(3) When the warning to navigation interests states that bombing and strafing operations will take place over the designated target areas or that other operations hazardous to watercraft are proposed to be conducted in a specifically described portion of the overall area, all watercraft will be excluded from the target area or otherwise described zone of operations and no vessel shall enter or remain therein during the period operations are in progress.

(4) Aircraft and naval vessels conducting operations in any part of the operational training area will exercise caution in order not to endanger watercraft. Operations which may be dangerous to watercraft will not be conducted without first ascertaining that the zone of operations is clear. Any vessel in the zone of operations will be warned to leave and upon being so warned the vessel shall leave immediately.

(5) The regulations in this section shall be enforced by the Commandant, Sixth Naval District, Charleston, S. C., and such agencies as he may designate.

Approved: FEB 28, 1962

/s/ Elvis J. Stahr, Jr.
Secretary of the Army

NOTE: The danger areas described in paragraph (a) (1) and subparagraphs (i) and (ii) hereinabove are still active and subject to bombing and rocket firing therein at any time upon proper notice.

The amendments to these rules and regulations will be in full force and effect and have the full force of law thirty days after their publication in the FEDERAL REGISTER. They were published in the FEDERAL REGISTER 16 March 1962; public notices of their approval were sent to all known interested parties on 23 March 1962; they have been posted at post offices and other public places.

APPENDIX 5

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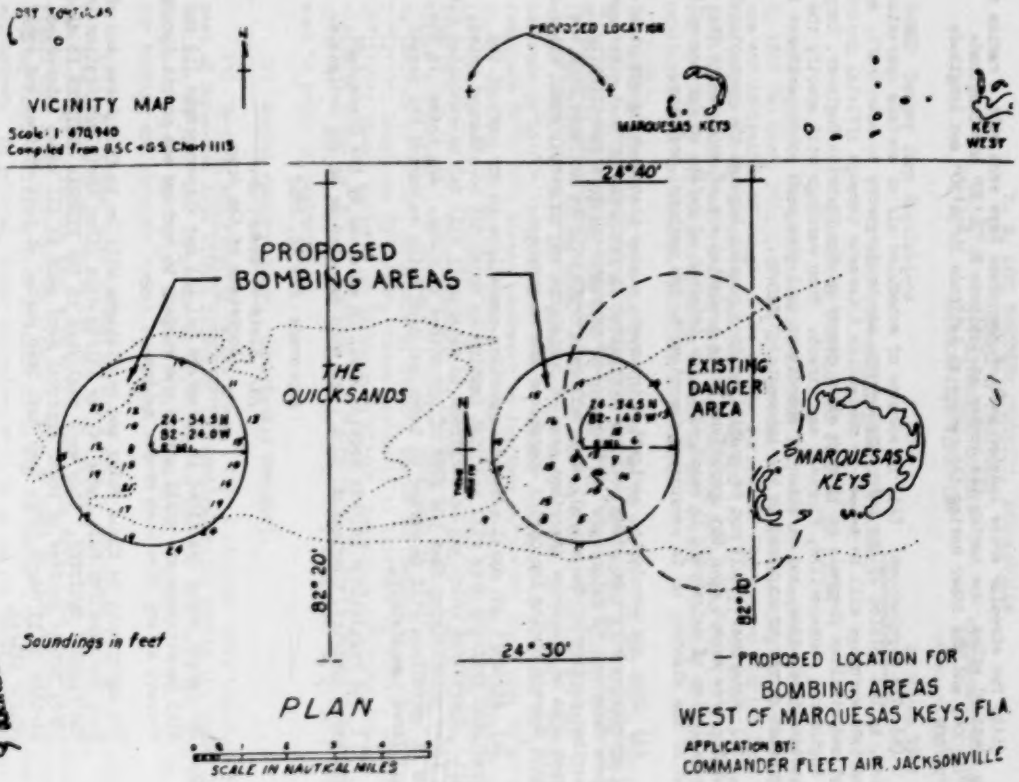

APPENDIX 6

U. S. ARMY ENGINEER DISTRICT, JACKSONVILLE
CORPS OF ENGINEERS
575 RIVERSIDE AVENUE
JACKSONVILLE 2, FLORIDA

Amended
See 23 May 1962

SAKSP Danger Zone Regulations 29 March 1960

PART 204--DANGER ZONE REGULATIONS

STRAITS OF FLORIDA AND FLORIDA BAY, FLORIDA

Pursuant to the provisions of section 7 of the River and Harbor Act of August 8, 1917 (40 Stat. 266; 33 U.S.C. 1), Section 204.95 governing the use and navigation of Naval operational training, aerial gunnery, and bombing and strafing areas in the Straits of Florida and Florida Bay, Florida, is hereby amended revoking subparagraphs (i) and (ii) of paragraph (a) (3), as follows:

204.95 Straits of Florida and Florida Bay in vicinity of Key West, Fla.; operational training area, aerial gunnery range, and bombing and strafing target areas, Naval Air Station, Key West, Fla. (a) The danger zones. (1) Operational training area. Waters of the Straits of Florida and Gulf of Mexico southwest, west and northwest of Key West bounded as follows: Beginning at latitude 25°45'00", longitude 82°07'00", thence southeast to latitude 24°49'00", longitude 81°55'00"; thence southwest to latitude 24°37'30", longitude 82°00'30"; thence westerly to latitude 24°37'30", longitude 82°06'00" thence southerly to latitude 24°28'30", longitude 82°06'00", thence southerly to latitude 24°25'00", longitude 82°06'30"; thence easterly to latitude 24° 25'00", longitude 81°57'00"; thence southwesterly to latitude 23°30'00", longitude 82°19'00"; thence westerly to latitude 23°30'00", longitude 82°41'00" thence northwesterly to latitude 23°52'30", longitude 83°11'00"; thence northerly to latitude 24°25'00", longitude 83°11'00"; thence easterly to latitude 24°25'00", longitude 83°08'00"; thence clockwise along the arc of a circle with a radius of 92 miles centered at latitude 24°35'00", longitude 81°41'15" to latitude 25°45'05", longitude 82°23'30"; thence east to point of beginning.

(2) Aerial gunnery range. (Previously revoked).

(3) Bombing and strafing target areas. (i) (Revoked).

(ii) (Revoked).

(iii) (Previously revoked).

(iv) A circular area immediately west of Marquesas Keys with a radius of two nautical miles having its center at latitude 24°33.4' and longitude 82° 10.9', not to include land area and area within Marquesas Keys. The target located within this area, a grounded LSIL will be used for bombing and aircraft rocket exercises.

(v) A circular area located directly west of Marquesas Keys with a radius of three statute miles having its center at latitude 24°35.6' and longitude

APPENDIX 7

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82°11.6', not to include land area within Marquesas Keys. The targets located within this area, pile-mounted platforms, will be used as high altitude horizontal bombing range utilizing live ordinance up to and including 1,000 pounds of high explosives. In general, these explosives will be of an air-burst type, above 1,500 feet.

(b) The regulations. (1) In advance of scheduled air or surface operations which, in the opinion of the enforcing agency, may be dangerous to watercraft, appropriate warnings will be issued to navigation interests through official government and civilian channels or in such other manner as the District Engineer, Corps of Engineers, Jacksonville, Florida, may direct. Such warnings will specify the location, type, time, and duration of operations, give such other pertinent information as may be required in the interests of safety, and state whether watercraft will be excluded from the zone of operations which is defined as that portion of a danger zone within which watercraft might be endangered by the operations in progress.

(2) Watercraft shall not be prohibited from passing through a danger zone except when the operations being conducted are of such a nature that the exclusion of watercraft from the zone of operations is required in the interests of safety or for accomplishment of the mission, or is considered important to the national security.

(3) When the warning to navigation interests states that watercraft will be excluded from the zone of operations, no vessel shall enter or remain in such area during the period the operations are in progress.

(4) Aircraft and naval vessels conducting operations in a danger zone will exercise caution in order not to endanger watercraft. Operations which may be dangerous to watercraft will not be conducted without first ascertaining that the zone of operations is clear. Any vessel in the zone of operations will be warned to leave, and upon being so warned the vessel shall leave the zone of operations immediately.

(5) The regulations in this section shall be enforced by the Commandant, Sixth Naval District, Charleston, S. C., and such agencies as he may designate.

Approved: 7 March 1960

/s/ William M. Brucker
Secretary of the Army

NOTE: The targets within the danger areas which have been revoked by this notice consisting of a grounded LCI and a grounded eagle boat are still in the waters and are submerged at a depth of about one foot below mean low water and located at latitude 24°34'30" N., longitude 82°14'00" W., and at latitude 24°36'20" N., longitude 82°16'25" W.

The adjacent danger zones described in subparagraph (iv) and (v) hereinabove are still active and bombing and rocket firing will continue in these areas.

APPENDIX 8

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RESTRICTED AREAS
KEY WEST, FLORIDA, COUNTY OF MONROE
APPLICATION BY U. S. NAVY

APPENDIX 9

COPY

U. S. ARMY ENGINEER DISTRICT, JACKSONVILLE
CORPS OF ENGINEERS
575 RIVERSIDE AVENUE
JACKSONVILLE 2, FLORIDA

Amended
Ltr 29 Mar 1960

SAKSP Danger Zone Regulations 25 September 1959

PART 204—DANGER ZONE REGULATIONS

STRAITS OF FLORIDA AND FLORIDA BAY, FLORIDA

Pursuant to the provisions of section 7 of the River and Harbor Act of August 8, 1917 (40 Stat. 266; 33 U.S.C. 1), Section 204.95 governing the use and navigation of Naval operational training, aerial gunnery, and bombing and strafing areas in the Straits of Florida and Florida Bay, Florida, is hereby amended to establish a new bombing and strafing area, as follows:

204.95 Straits of Florida and Florida Bay in vicinity of Key West, Fla.; operational training area, aerial gunnery range, and bombing and strafing target areas, Naval Air Station, Key West, Fla. (a) The danger zones. (1) Operational training area. Waters of the Straits of Florida and Gulf of Mexico southwest, west and northwest of Key West bounded as follows: Beginning at latitude 25°45'00", longitude 82°07'00", thence southeast to latitude 24°49'00", longitude 81°55'00"; thence southwest to latitude 24°37'30", longitude 82°00'30"; thence westerly to latitude 24°37'30", longitude 82°06'00"; thence southerly to latitude 24°28'30", longitude 82°06'00"; thence southerly to latitude 24°25'00", longitude 82°06'30"; thence easterly to latitude 24° 25'00", longitude 81°57'00"; thence southwesterly to latitude 23°30'00", longitude 82°19'00"; thence westerly to latitude 23°30'00", longitude 82°46'00"; thence northwesterly to latitude 23°52'30", longitude 83°11'00"; thence northerly to latitude 24°25'00", longitude 83°11'00"; thence easterly to latitude 24°25'00", longitude 83°08'00"; thence clockwise along the arc of a circle with a radius of 92 miles centered at latitude 24°35'00", longitude 81°41'15" to latitude 25°45'05", longitude 82°23'30"; thence east to point of beginning.

(2) Aerial gunnery range. (Revoked).

(3) Bombing and strafing target areas. (i) A circular area immediately west of Marquesas Keys with a radius of two and one-half statute miles having its center at latitude 24°34'30", longitude 82°14'00". The target located within this area, a grounded LCI, will be used for air-to-ground gunnery exercises.

(ii) A circular area immediately north of Marquesas Keys with a radius of two nautical miles having its center at latitude 24°38'20", longitude 82°06'25". The target located within this area, a grounded eagle boat, will be used for bombing exercises using water-filled bombs only.

APPENDIX 10

(iii) (Revoked).

(iv) A circular area immediately west of Marquesas Keys with a radius of two nautical miles having its center at latitude 24°33.4' and longitude 82° 10.9', not to include land area and area within Marquesas Keys. The target located within this area, a grounded LSIL will be used for bombing and aircraft rocket exercises.

(v) A circular area located directly west of Marquesas Keys with a radius of three statute miles having its center at latitude 24°35.6' and longitude 82°11.6', not to include land area within Marquesas Keys. The targets located within this area, pile-mounted platforms, will be used as high altitude horizontal bombing range utilizing live ordnance up to and including 1,800 pounds of high explosives. In general, these explosives will be of an air-burst type, above 1,500 feet.

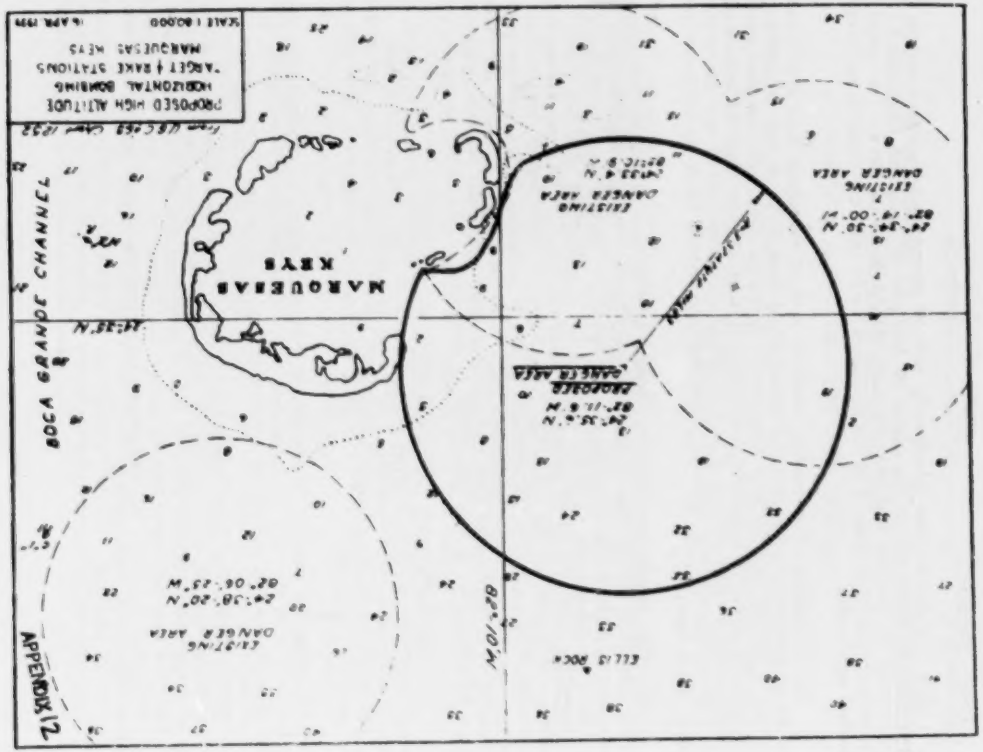
(b) The regulations. (1) In advance of scheduled air or surface operations which, in the opinion of the enforcing agency, may be dangerous to watercraft, appropriate warnings will be issued to navigation interests through official government and civilian channels or in such other manner as the District Engineer, Corps of Engineers, Jacksonville, Florida, may direct. Such warnings will specify the location, type, time, and duration of operations, give such other pertinent information as may be required in the interests of safety, and state whether watercraft will be excluded from the zone of operations which is defined as that portion of a danger zone within which watercraft might be endangered by the operations in progress.

(2) Watercraft shall not be prohibited from passing through a danger zone except when the operations being conducted are of such a nature that the exclusion of watercraft from the zone of operations is required in the interests of safety or for accomplishment of the mission, or is considered important to the national security.

(3) When the warning to navigation interests states that watercraft will be excluded from the zone of operations, no vessel shall enter or remain in such area during the period the operations are in progress.

(4) Aircraft and naval vessels conducting operations in a danger zone will exercise caution in order not to endanger watercraft. Operations which may be dangerous to watercraft will not be conducted without first ascertaining that the zone of operations is clear. Any vessel in the zone of operations will be warned to leave, and upon being so warned the vessel shall leave the zone of operations immediately.

APPENDIX 11



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DEPARTMENT OF THE ARMY
Jacksonville District, Corps of Engineers
P. O. Box 4970
Jacksonville, Florida 32201

SAJSP Restricted Area - Key West 6 May 1969

TITLE 33 - NAVIGATION AND NAVIGABLE WATERS
CHAPTER II - CORPS OF ENGINEERS, DEPARTMENT OF THE ARMY
PART 207 - NAVIGATION REGULATIONS
KEY WEST HARBOR, FLA

Pursuant to the provisions of Section 7 of the River and Harbor Act of August 8, 1917 (40 Stat. 266; 33 U.S.C. 1), Section 207.173a establishing and governing the use of a restricted area in Key West Harbor, Florida, is hereby amended in its entirety, effective 30 days after publication in the FEDERAL REGISTER as follows:

207.173a Key West Harbor, at U. S. Naval Base, Key West, Fla; naval restricted area.

(a) The areas. (1) All waters within one hundred yards of the U. S. Naval Station beginning at a point one hundred yards due south of the south end of Whitehead Street at latitude 24°32'42.3"N, longitude 81°47'51"W, and extending westerly and northerly around the U. S. Naval Station to latitude 24°33'33"N, longitude 81°48'32.7"W; and thence to the shore at latitude 24°33'32"N, longitude 81°48'29.5"W; the north end of the U. S. Coast Guard Base.

(2) All waters within one hundred yards of the U. S. Naval Station Annex and the U. S. Naval Air Station Annex beginning at the shore at latitude 24°33'47.8"N, longitude 81°47'55.6"W; thence westerly to latitude 24°33'48"N, longitude 81°48'00.9"W; thence southerly to latitude 24°33'45.8"N, longitude 81°48'01"W; thence westerly to latitude 24°33'47"N, longitude 81°48'12"W; thence northerly to latitude 24°34'00.3"N, longitude 81°48'10"W; and thence to latitude 24°33'57.6"N, longitude 81°47'20"W, one hundred yards offshore of beacon No. 13.

(3) All waters within one hundred yards of Fleming Key and within one hundred yards of the fence across Fleming Key Cove.

(b) The regulations. (1) Entering or crossing any of the restricted areas described in paragraph (a) of this section is prohibited except as follows: Privately-owned vessels properly registered and bearing identification in accordance with Federal and/or State laws and regulations, and at night showing lights required by Federal laws and U. S. Coast Guard regulations or, if no constant lights are required, then a bright white light showing all around the horizon, may transit the following portions of the restricted areas:

(i) The channel about 75 yards in width extending from the northwest corner of the U. S. Naval Station Annex eastward beneath the Fleming Key bridge along the north shore of the U. S. Naval Station Annex and the U. S. Naval Air Station Annex:

APPENDIX 13

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(ii) A channel 150 feet in width which will extend easterly from the main ship channel into Key West Bight, the northerly edge of which channel passes 25 feet south of the Navy Annex piers on the north side of the Bight. While legitimate access of privately owned vessels to facilities of Key West Bight is unimpeded, it is prohibited from mooring, anchoring, or fishing within 50 feet of any U. S. Navy owned pier or craft.

(2) Stopping or landing by other than government owned vessels and certain specifically authorized private craft in any of the restricted areas described in paragraph (a) of this section is prohibited.

(3) Vessels using the restricted channel areas described in subdivisions (i) and (ii) shall proceed at speeds commensurate with minimum wake.

(4) The regulations in this section shall be enforced by the Commander, U. S. Naval Base, Key West, Florida, and such agencies as he may designate.

Approved: 7 April 1969

/s/ Stanley R. Resor

/t/ STANLEY R. RESOR
Secretary of the Army

These rules and regulations will be in full force and effect 30 days after their publication in the FEDERAL REGISTER. They were published in the FEDERAL REGISTER on 25 April 1969; public notices of their approval were sent to all known interested parties on 6 May 1969; they have been posted at post offices and other public places.

APPENDIX 14

24 June 1948

PART 204--DANGER ZONE REGULATIONS

STRAITS OF FLORIDA AND FLORIDA BAY IN VICINITY OF KEY WEST, FLA.

Pursuant to the provisions of section 7 of the River and Harbor Act of August 8, 1917 (40 Stat. 266; 33 U.S.C. 1), section 204.85c is hereby prescribed to govern the use and navigation of waters of the Straits of Florida and Florida Bay in the vicinity of Key West, Florida, comprising restricted areas for operations of the Naval Air Station, Key West, as follows:

204.85c Straits of Florida in Florida Bay in vicinity of Key West, Fla.; operational training area, aerial gunnery range, and bombing and strafing target areas, Naval Air Station, Key West, Fla.

(a) The danger zones. (1) Operational training area. Waters of the Straits of Florida southwest of Key West bounded as follows: Beginning at latitude 24°18'00", longitude 82°09'30"; thence south-southwest to latitude 23°30'30", longitude 82°31'30"; thence generally northwest by north, along an arc of a circle having its center at latitude 24°35'00", longitude 81°41'16", to latitude 24°18'00", longitude 83°06'30"; thence due east to the point of beginning. This area will be used for bombing, torpedo, and air-to-air combat or other special exercises.

(2) Aerial gunnery range. Waters in the vicinity of Florida Bay, northeast of Key West bounded as follows: Beginning at latitude 25°30'00", longitude 81°22'00"; thence south to latitude 25°01'45", longitude 81°20'30"; thence southwest to latitude 24°51'15", longitude 81°42'00"; thence north to latitude 25°42'00", longitude 81°46'00"; thence southeast to the point of beginning. This area will be used for air-to-air gunnery or other exercises.

(3) Bombing and strafing target areas. (i) A circular area immediately west of Marquesas Keys with a radius of two and one-half statute miles having its center at latitude 24°34'30", longitude 82°14'00". The target located within this area, a grounded LCI, will be used for air-to-ground gunnery exercises.

(ii) A circular area immediately north of Marquesas Keys with a radius of two nautical miles having its center at latitude 24°38'20", longitude 82°06'25". The target located within this area, a grounded eagle boat, will be used for bombing exercises using water-filled bombs only.

(iii) A rectangular area immediately northeast of Key West bounded as follows: Beginning at latitude 24°40'14", longitude 81°35'12"; thence to latitude 24°38'25", longitude 81°34'38"; thence to latitude 24°37'10", longitude 81°38'46"; thence to latitude 24°38'50", longitude 81°39'23"; thence to the point of beginning. This area, an aircraft rocket range, will be used for air-to-ground rocket firing exercises.

Said Superseded

APPENDIX 15

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(b) The regulations. (1) In advance of scheduled air or surface operations which, in the opinion of the enforcing agency, may be dangerous to watercraft, appropriate warnings will be issued to navigation interests through official government and civilian channels or in such other manner as the District Engineer, Corps of Engineers, Jacksonville, Florida, may direct. Such warnings will specify the location, type, time, and duration of operations, give such other pertinent information as may be required in the interests of safety, and state whether watercraft will be excluded from the zone of operations which is defined as that portion of a danger zone within which watercraft might be endangered by the operations in progress.

(2) Watercraft shall not be prohibited from passing through a danger zone except when the operations being conducted are of such a nature that the exclusion of watercraft from the zone of operations is required in the interests of safety or for accomplishment of the mission, or is considered important to the national security.

(3) When the warning to navigation interests states that watercraft will be excluded from the zone of operations, no vessel shall enter or remain in such area during the period the operations are in progress.

(4) Aircraft and naval vessels conducting operations in a danger zone will exercise caution in order not to endanger watercraft. Operations which may be dangerous to watercraft will not be conducted without first ascertaining that the zone of operations is clear. Any vessel in the zone of operations will be warned to leave, and upon being so warned the vessel shall leave the zone of operations immediately.

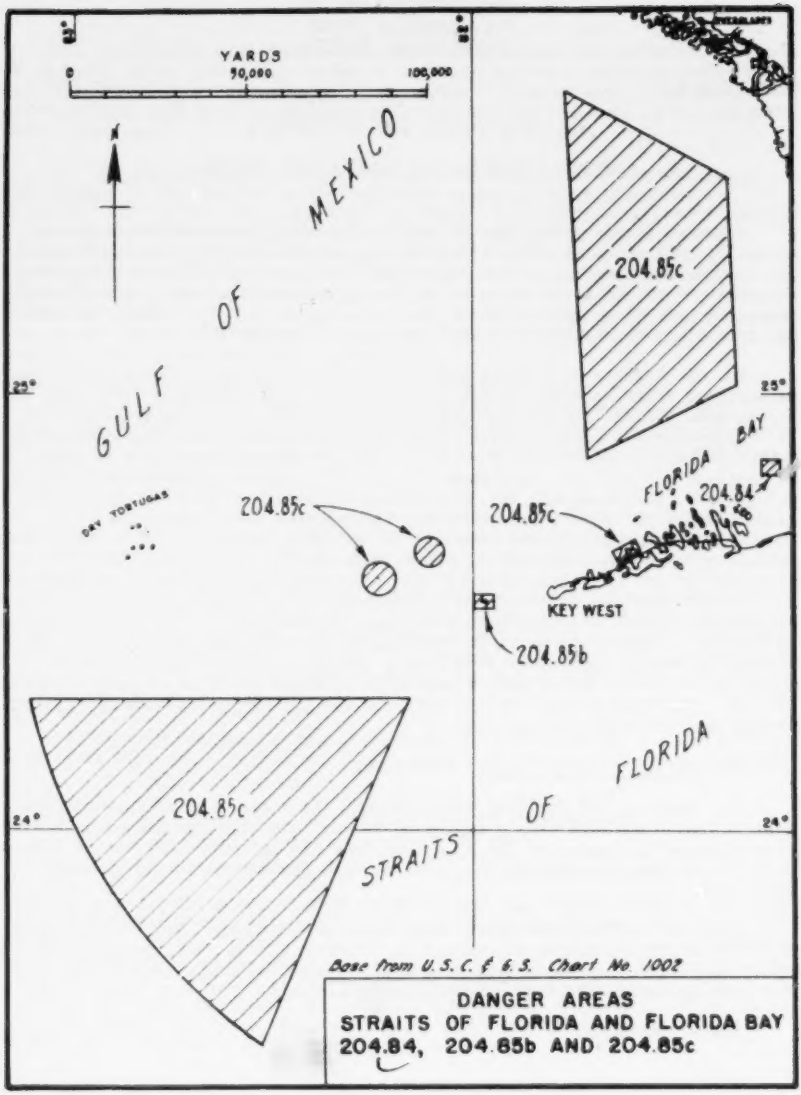
(5) The regulations in this section shall be enforced by the Commandant Seventh Naval District, Jacksonville, Florida, and such agencies as he may designate.

Approved June 1, 1948

/s/ Kenneth C. Royall
Secretary of the Army

These rules and regulations will be in full force and effect and have the force of law 30 days after their publication in the Federal Register. They were published in the Federal Register on 22 June 1948; public notice of their approval were sent to all known interested parties on 24 June 1948. They have been posted in the post offices at Key West, Miami, Miami Beach, Ft. Lauderdale, Stuart, Fort Pierce, Palm Beach, West Palm Beach, and Lake Worth, all in Florida; and furnished to local press for publication as a news item.

APPENDIX 16



APPENDIX 17

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CORPS OF ENGINEERS, U. S. ARMY
OFFICE OF THE DISTRICT ENGINEER
JACKSONVILLE DISTRICT
575 RIVERSIDE AVENUE
JACKSONVILLE, FLORIDA

SAKSP 800.2121 19 July 1957

PART 204--DANGER ZONE REGULATIONS

STRAITS OF FLORIDA AND FLORIDA BAY, FLORIDA

Pursuant to the provisions of section 7 of the River and Harbor Act of August 8, 1917 (40 Stat. 266; 33 U.S.C. 1), Section 204.95 governing the use and navigation of waters of the Straits of Florida and Florida Bay, Florida, comprising Naval operational training, aerial gunnery, and bombing and strafing areas, is hereby amended to delete the presently established areas, to establish new areas, and to change the enforcing agency as follows:

204.95 Straits of Florida and Florida Bay in vicinity of Key West, Fla.; operational training area, aerial gunnery range, and bombing and strafing target areas, Naval Air Station, Key West, Fla. (a) The danger zones. (1) Operational training area. Waters of the Straits of Florida and Gulf of Mexico southwest, west and northwest of Key West bounded as follows: Beginning at latitude 25° 45' 00", longitude 82° 07' 00", thence southeast to latitude 24° 49' 00", longitude 81° 55' 00"; thence southwest to latitude 24° 37' 30", longitude 82° 00' 30"; thence westerly to latitude 24° 37' 30", longitude 82° 06' 00"; thence southerly to latitude 24° 28' 30", longitude 82° 06' 00"; thence southerly to latitude 24° 25' 00", longitude 82° 06' 30"; thence easterly to latitude 24° 25' 00", longitude 81° 57' 00"; thence southwesterly to latitude 23° 30' 00", longitude 82° 19' 00"; thence westerly to latitude 23° 30' 00", longitude 82° 46' 00"; thence northwesterly to latitude 23° 52' 30", longitude 83° 11' 30"; thence northerly to latitude 24° 25' 00", longitude 83° 11' 00"; thence easterly to latitude 24° 25' 00", longitude 83° 00' 00"; thence clockwise along the arc of a circle with a radius of 9½ miles centered at latitude 24° 35' 00", longitude 81° 41' 15" to latitude 25° 45' 05", longitude 82° 23' 30"; thence east to point of beginning.

(2) Aerial gunnery range. (Revoked).

(3) Bombing and strafing target areas. (i) A circular area immediately west of Marquesas Keys with a radius of two and one-half statute miles having its center at latitude 24° 34' 30", longitude 82° 14' 00". The target located within this area, a grounded LCI, will be used for air-to-ground gunnery exercises.

(ii) A circular area immediately north of Marquesas Keys with a radius of two nautical miles having its center at latitude 24° 38' 20", longitude 82° 05' 25". The target located within this area, a grounded eagle boat, will be used for bombing exercises using water-filled bombs only.

(iii) (Revoked).

APPENDIX 18

(iv) A circular area immediately west of Marquesas Keys with a radius of two nautical miles having its center at latitude 24° 33.4' and longitude 82° 10.9', not to include land area and area within Marquesas Keys. The target located within this area, a grounded LSIL will be used for bombing and aircraft rocket exercises.

(b) The regulations. (1) In advance of scheduled air or surface operations which, in the opinion of the enforcing agency, may be dangerous to watercraft, appropriate warnings will be issued to navigation interests through official government and civilian channels or in such other manner as the District Engineer, Corps of Engineers, Jacksonville, Florida, may direct. Such warnings will specify the location, type, time, and duration of operations, give such other pertinent information as may be required in the interests of safety, and state whether watercraft will be excluded from the zone of operations which is defined as that portion of a danger zone within which watercraft might be endangered by the operations in progress.

(2) Watercraft shall not be prohibited from passing through a danger zone except when the operations being conducted are of such a nature that the exclusion of watercraft from the zone of operations is required in the interests of safety or for accomplishment of the mission, or is considered important to the national security.

(3) When the warning to navigation interests states that watercraft will be excluded from the zone of operations, no vessel shall enter or remain in such area during the period the operations are in progress.

(4) Aircraft and naval vessels conducting operations in a danger zone will exercise caution in order not to endanger watercraft. Operations which may be dangerous to watercraft will not be conducted without first ascertaining that the zone of operations is clear. Any vessel in the zone of operations will be warned to leave, and upon being so warned the vessel shall leave the zone of operations immediately.

(5) The regulations in this section shall be enforced by the Commandant, Sixth Naval District, Charleston, S. C., and such agencies as he may designate.

Approved: 23 May 1957

/s/ Dewey Short
Assistant Secretary of the Army
(Civil-Military Affairs)

These rules and regulations will be in full force and effect and have the full force of law thirty days after their publication in the Federal Register. They were published in the Federal Register 13 July 1957; public notices of their approval were sent to all known interested parties on 19 July 1957; they have been posted in the post offices at Miami, Miami Beach, Homestead, Florida City, Marathon, Key West, Key Largo, Islamorada, Perrine, Ft. Lauderdale, Palm Beach, West Palm Beach, Ft. Myers, St. Petersburg, Tampa and Clearwater, all in Florida, and furnished to local press for publication as a news item.

APPENDIX 19

POOR COPY

Amended

DANGER AREA

Pursuant to the provisions of section 7 of the River and Harbor Act of August 8, 1917 (40 Stat. 266; 33 U.S.C. 1), and chapter XIX of the Army Appropriation Act of July 9, 1918 (40 Stat. 892; 33 U.S.C. 3), section 204.84 is amended to govern the use and navigation in Florida Bay northeast of Pine Islands as follows:

204.~~84~~ 86 Florida Bay northeast of Pine Islands, Fla.; live firing area for strafing. (a) The danger zone. (1) Bounded on the north by latitude 24° 51' 08"; on the east by longitude 81° 13' 52"; on the south by latitude 24° 48' 52"; and on the west by longitude 81° 16' 21".

(2) The hull of an ex-naval vessel (PE-19) is located in the center of the area and is used by United States Fleet Aircraft for live strafing.

(b) The regulations. (1) The area is closed to all vessels at all times.

(2) The regulations in this section shall be enforced by the Captain of the Port, Key West, Florida.

Approved 29 December 1948.

William H. Draper, Jr.
Acting Secretary of the Army.

These regulations, when published, have the force of law. They were published in the Federal Register on 31 December 1948; public notices of their approval were sent to all interested persons known to this office on 1 March 1949; they have been posted at post offices at Key West, Marathon, Tavernier, Florida City, Homestead, Miami and Miami Beach, Florida.

TITLE 33 - NAVIGATION AND NAVIGABLE WATERS

CHAPTER II - CORPS OF ENGINEERS, DEPARTMENT OF THE ARMY

PART 204 - DANGER ZONE REGULATIONS

FLORIDA BAY, FLORIDA

Pursuant to the provisions of Section 7 of the River and Harbor Act of August 8, 1917 (40 Stat. 266; 33 U.S.C. 1) Section 204.86 establishing and governing the use of a danger zone in Florida Bay, Northeast of Pine Islands, Florida is hereby revoked, effective upon publication in the Federal Register.

Since the revocation constitutes only a procedural matter, notice of proposed rule making and public procedures thereto are considered unnecessary. Accordingly, Part 204.86 of Title 33 of the Code of Federal Regulations is hereby revoked as follows:

204.86 Florida Bay, Northeast of Pine Islands, Florida live firing area for strafing. (Revoked)

DATE 16 JUL 1973

Approved: Hadlai A. Hull

Acting Secretary of the Army

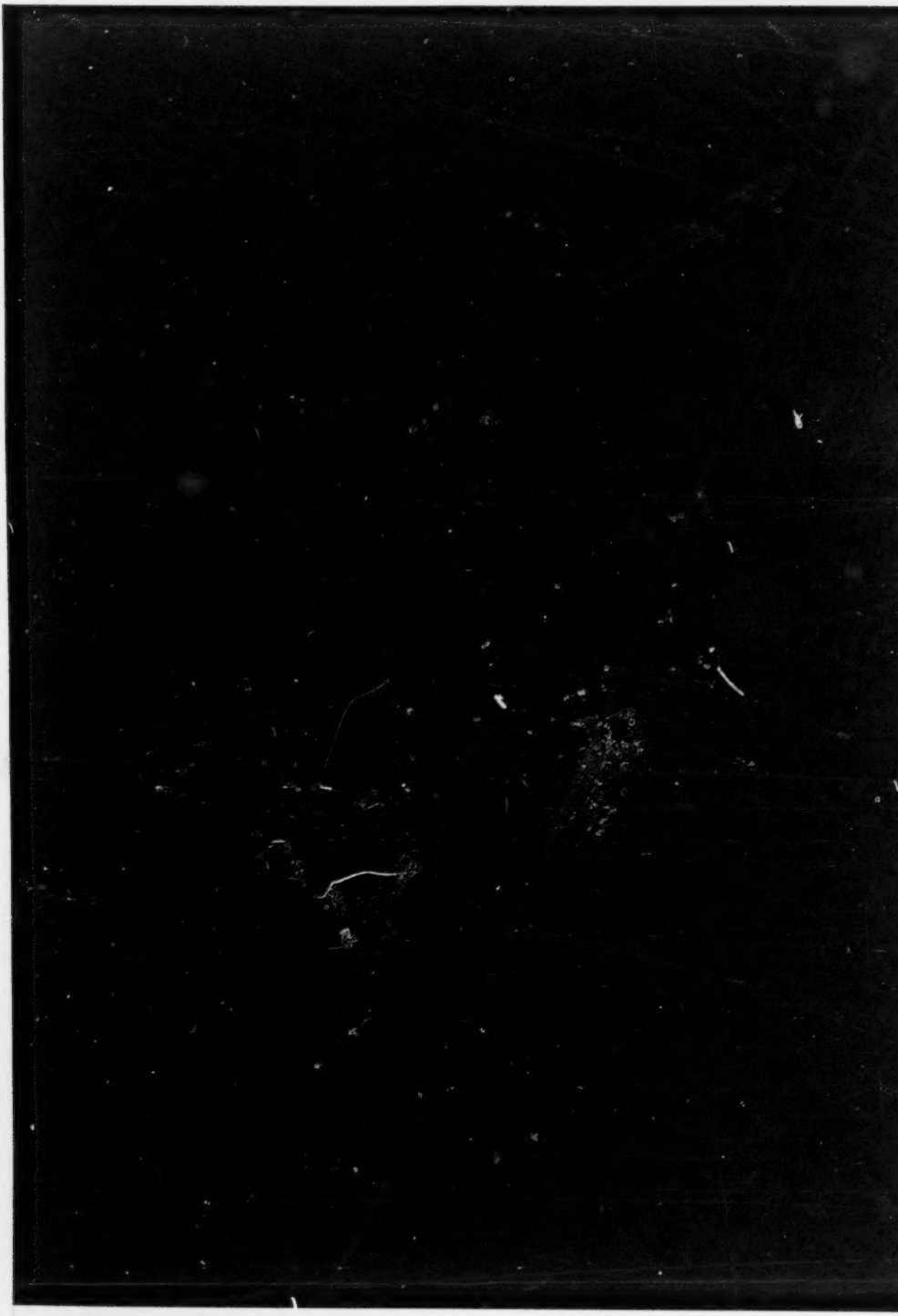
APPENDIX 21

POOR COPY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing APPENDIX have been served upon Robert H. Bork, Solicitor General of the United States of America; and Michael W. Reed, Esq., Department of Justice, Washington, D.C., 20530, Attorneys for Plaintiff; and Brice M. Clagett, Esq., Covington & Burling, 888 Sixteenth Street, N.W., Washington, D.C., 20006, Attorneys for Amici Curiae, by United States Mail, this 8th day of August, 1974.

DANIEL S. DEARING
Chief Trial Counsel
Attorney for Defendant,
STATE OF FLORIDA.



In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 52, ORIGINAL

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF FLORIDA

REPLY BRIEF OF THE UNITED STATES

INTRODUCTION

Two separate sets of exceptions to the Report of the Special Master have been filed in this case. The State has excepted to, *inter alia,* the Special Master's determinations that, under this Court's decision in *United States* v. *California,* 332 U.S. 19, the State's proprietary rights in the adjacent seabed are limited to those granted by Congress in the Submerged Lands Act, 43 U.S.C. 1301 *et seq.,* and that the waters of the Gulf of Mexico that lie between the mainland and the Florida Keys, east of a line running due northeast from the Tortugas Islands to Cape Romano, do not comprise an historic bay belonging to the State. We answered the State's contentions on those points in a responsive brief filed in August 1974.

The United States excepted to the Special Master's determinations that a smaller body of water lying between the mainland and the upper Florida Keys, east of a line drawn between Knight Key and the East Cape

of Cape Sable, comprises a juridicial bay and that the narrow waters within three groups of outlying islands are inland waters of the State. In August 1974 the State filed a brief purporting to respond to the exceptions of the United States. In fact, however, the United States' exceptions are not opposed in that brief; the State apparently concedes (Br. 3, 4)[1] that no part of the area it designates generally as Florida Bay is a juridical bay, and it raises no objection to the United States' contention that the narrow waters within the three groups of outlying islands are not inland waters.

Instead, the State in its responsive brief merely reargues its own exceptions. The State again argues (Br. 12-18) that its seabed rights extend beyond the limits set forth in the Submerged Lands Act and (Br. 3-11) that it possesses a large portion of the Gulf of Mexico as an historic bay. The State's arguments on the former point are, we believe, adequately met in our responsive brief and we do not address them further here. But since the State, in discussing the historic-bay issue, has raised new evidentiary matters and requested a remand to the Special Master, we believe that it is appropriate to comment further on the State's claim to an historic bay.

ARGUMENT

1. The State argues (Br. 4-8) that the United States' military use of a portion of Florida Bay,[2] and its

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[1]"Br." refers to the State's brief in response to the United States' exceptions.

[2]Following the State's practice, we here use the designation "Florida Bay" to refer to the large body of water claimed by the State as an historic bay. The Special Master used the same designation to refer to the much smaller area that he determined to be a juridical bay. See Report, p. 39.

designation of that portion as a "danger area," represent exercises of sovereign authority inconsistent with the federal disclaimer of historic title. We disagree.

The Florida Bay danger area is merely one of many established by this and other nations throughout the high seas:

> From time immemorial, extensive fleet anchorages have been maintained offshore, and naval exercises, parades, and maneuvers have been held at sea. Target practice is held at sea and from coasts outward. Various types of "proving grounds" are established. * * * In addition, all governments with maritime interests establish warning, danger, restricted or prohibited areas for numerous purposes, large areas and small, areas temporarily established and others permanently. They deal with various hazards of navigation. They are regularly marked on hydrographic charts or otherwise through the customary channels brought to the attention of mariners and fisher-folk. At a recent date the United States had "established a total of 447 such warning and/or danger areas." [Reiff, *The United States and the Treaty Law of the Sea* 365-366 (1959).]

The creation of such danger areas has never been considered an exercise of sovereign authority or an assertion of jurisdiction. See Pender, *Jurisdictional Approaches to Maritime Environments—A Space Age Perspective,* XV J.A.G. J. 155, 157-158 (1961). To the contrary, international law has long permitted the use of of high seas for military practices and the establishment of danger areas for such practices. See 4 Whiteman, *Digest*

of International Law 549 (1965).[3] Thus, in addition to the United States, France, the United Kingdom,[4] Canada, Australia, and the Soviet Union have all demarcated areas of the high seas for the conduct of military exercises. McDougal & Burke, *The Public Order of the Oceans* 593 (1962).

In particular, the United States has consistently taken the position that "[m]ilitary exercises are a traditional use of the high seas * * *." 34 Dept. State Bull. 566, 567 (1956). See, also, 4 Whiteman, *supra,* at 549; McDougal & Burke, *supra,* at 592. It is therefore clear that the creation of a danger area for the conduct of military exercises in a portion of Florida Bay does not represent an exercise of sovereign authority or an assertion of jurisdiction inconsistent with that Bay's status as international water.

The United States, both in this litigation and in its representations to foreign nations (see Report, p. 42; see, also, p. 25 of our responsive brief), has affirmatively disclaimed sovereignty over the portion of Florida Bay that lies seaward of the three-mile territorial sea.

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[3]The comprehensive breadth of this principle of international law and its widespread acceptance in the international community were reflected in the International Law Commission's rejection, in the course of drafting the 1958 Convention on the High Seas, of a proposal that would have barred the creation of such danger areas "on the high seas near foreign coasts or on international sea routes." See 4 Whiteman, *supra,* at 545.

[4]The British government has formally taken the position that "[t]he temporary use of areas outside territorial waters for gunnery or bombing practice has, as such, never been considered a violation of the principles of freedom of navigation on the high seas." 4 Whiteman, *supra,* at 598.

The existence of a military danger area in those outlying waters does not conflict with that disclaimer.[5]

2. The State further argues (Br. 8-11) that a statement made by Senator Fulbright during Senate consideration of the Tortugas shrimp fishery agreement of 1959 between the United States and Cuba constitutes evidence of foreign acquiescence in the State's claim of historic title to Florida Bay.[6] Again, we disagree.

The 1959 Tortugas shrimp fishery agreement (10 U.S.T. 1703) grew out of concern, arising during the 1950's, that the fishery was becoming depleted. In 1957 the State had enacted legislation that purported to prohibit domestic vessels from shrimping in the Tortugas fishery; that legislation expressly exempted foreign vessels from its coverage. See U.S. Ex. 93. The federal government, recognizing that Cuba's participation would be necessary to the success of any conservation scheme, entered into negotiations with that nation for an agreement covering the operations of both nation's shrimpers. Once Cuba ratified the agreement, it voluntarily observed the State's shrimping regulations pending ratification of the agreement by the United States.[7] It was to that voluntary observance that Senator Fulbright referred.

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[5]Accordingly, the Special Master properly imposed upon the State the burden, which it did not carry, of proving that its claimed historic title was "clear beyond doubt." See *United States* v. *California*, 381 U.S. 139, 175; *United States* v. *Louisiana*, 304 U.S. 11, 73.

[6]Senator Fulbright observed that, pending ratification of the agreement, the United States and Cuba were observing "a 'gentlemen's agreement' regarding Florida's regulations * * *." 105 Cong. Rec. 9846.

[7]Following ratification of the agreement by the United States, a bilateral commission was established that promulgated shrimping regulations for the Tortugas fishery.

Contrary to the State's argument, this history clearly evidences Cuba's understanding (as well as that of the United States) that the Tortugas shrimp fishery lies in international waters. If, as the State contends, Cuba had acquiesced in the State's claim of historic title, no agreement between the two nations with respect to that fishery would have been necessary.[8] Indeed, upholding the State's claim in this case would effectively abrogate the position taken by the United States in negotiating and entering into that international agreement.

CONCLUSION

The State's request that the case be remanded to the Special Master for further consideration of the evidence should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

WALLACE H. JOHNSON,
Assistant Attorney General.

KEITH A. JONES,
Assistant to the Solicitor General.

BRUCE C. RASHKOW,
MICHAEL W. REED,
Attorneys.

FEBRUARY 1975.

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[8] The United States prohibits foreign commercial fishing within its territorial waters. 16 U.S.C. 1081; 46 U.S.C. 251.

Supreme Court, U. S.
FILED
DEC 30 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 52 Original

UNITED STATES OF AMERICA,
Plaintiff

v.

STATE OF FLORIDA,
Defendant

Supplemental Report of Albert B. Maris, Special Master

December 30, 1975

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107 (215) 561-4050

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975 No. 52 Original

UNITED STATES OF AMERICA,
Plaintiff

v.

STATE OF FLORIDA,
Defendant

SUPPLEMENAL REPORT OF ALBERT B. MARIS, SPECIAL MASTER

This case involves the determination of the extent of the rights of the State of Florida, as against the United States of America, to the seabed and subsoil of the continental shelf seaward of its coastline on the Atlantic Ocean, and a more precise determination than had previously been made of the extent of those rights seaward of the coastline in the Gulf of Mexico. Necessarily involved is the determination of the exact location of those coastlines. In my previous report to the Court, filed January 18, 1974, the course of the prior proceedings in the case was fully described. In that report I made recommendations for the determinaton of all the issues in the case. Exceptions to my report were filed by each of the parties. In its opinion Per Curiam, filed March 17, 1975, 420 U.S. 531, the Court overruled all the exceptions filed by the State of Florida.

The exceptions filed by the United States involved my recommendations with respect to the recognition of a portion of Florida Bay as a juridical bay and the recognition as inland waters of the State of Florida of the narrow waters lying between the individual islands of the three groups of islands known, respectively, as the lower Florida Keys, the Marquesas and the Dry Tortugas. With respect to these recommendations I had not had the benefit of the contentions for and against the exceptions of the United States which were advanced by the parties in the Supreme Court. The Court accordingly referred those exceptions back to me for consideration, with authority to conduct supplemental proceedings with respect thereto and to file a supplemental report restricted to the issues involved in them.

Pursuant to the direction of the Court a prehearing conference with counsel was held in my chambers in Philadelphia on April 4, 1975 at which the issues involved and the future procedure were discussed. Following that conference counsel entered into negotiations for an agreed settlement of the questions involved in the exceptions of the United States. Such an agreement was ultimately reached and embodied in a written stipulation, dated December 11, 1975, signed by Hon. Robert L. Shevin, Attorney General of the State of Florida, and Hon. Robert H. Bork, Solicitor General of the United States of America.

Briefly summarized the stipulation, in addition to articulating the understanding of the parties as to the issues already resolved by the Court, provides

(1) that the State of Florida is entitled to the exclusive right to explore and exploit the natural resources of the continental shelf lying within three marine leagues of its coastline in the Gulf of Mexico as it existed in 1868 but not more than three leagues from its present coastline:

(2) that since the Gulf coastline is likely to have undergone few significant changes since 1868, that coastline, for purposes of measuring the area of Florida's Submerged Lands Act grant, will be deemed to be that depicted on the charts constructed from information acquired through the joint state-federal mapping project presently being conducted;

(3) that there is no juridical bay between the upper Florida Keys and the Florida mainland whose closing line affects the seaward limit of Florida's Submerged Lands Act grant;

(4) that the narrow waters within the lower Florida Keys, the Marquesas and the Dry Tortugas are generally territorial seas and not inland waters, and there are no such inland waters whose closing lines affect the seaward limit of Florida's Submerged Lands Act grant; and

(5) the coastline of Florida from which is to be measured its Submerged Lands Act grant is recognized to be ambulatory, as are offshore boundaries measured from that coastline.

The original signed stipulation of the parties is being filed with the Clerk of the Court today and a copy is annexed to this report, as Appendix A. In my opinion, the stipulation effects a reasonable and just solution of the issues remaining in the case and should be approved.

There now being no issues remaining to be resolved, I recommend that the stipulation of the parties be approved and that the parties be directed to submit to the Court forms of a declaratory decree in accord with the findings and conclusions set out in my report of January 18, 1974 modified to the extent necessary to conform with the stipulation of the parties submitted herewith, the decree to be drawn with the necessary technical precision to carry those findings and conclusions into effect. The decree should also provide that each party bear its own

costs and that the expenses of the special master be borne by the parties in equal shares. It should also reserve the jurisdiction of the Court to entertain such further proceedings, enter such orders and issue such writs as may from time to time be deemed necessary or advisable to supplement the decree and give it proper force and effect.

Respectfully submitted,

ALBERT B. MARIS,
Special Master

December 30, 1975

APPENDIX A

STIPULATION

The United States of America and the State of Florida, in an attempt to resolve all remaining issues in this litigation and articulate their mutual understanding of material issues already resolved through recommendation of the Special Master and adoption by the Supreme Court of the United States, agree as follows:

1. The coastline of the State of Florida, from which are to be measured the boundaries of the said State of Florida for the purposes of the Submerged Lands Act, 43 U.S.C. 1301, *et seq.*, is the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limits of inland waters and bays, as determined by pertinent articles of the Convention on the Territorial Sea and the Contiguous Zone, Geneva 1958, 15 U.S.T. (Pt. 2) 1606.

2. For the purposes of Paragraph One (1) of this Stipulation, the "coast" of the State of Florida refers not only to the mainland coast but also to the coast of any island which is a part of Florida, and of any low-tide elevation which is within three (3) geographic miles of the Florida mainland or any island which is a part of Florida.

3. The coastline referred to in Paragraph One (1) above is recognized to be ambulatory as are offshore boundaries measured from this coastline.

4. In the Atlantic Ocean, the State of Florida is entitled, as against the United State and all persons claiming under it, to the exclusive right to explore and exploit the natural resources of the continental shelf lying within three (3) geographic miles of the coastline referred to in Paragraph One (1) above.

5. In the Gulf of Mexico, the State of Florida is entitled, as against the United States and all persons claiming under it, to the exclusive right to explore and exploit the natural resources of the continental shelf lying within three (3) marine leagues of the coastline of Florida as it existed in 1868 as determined in accordance with Paragraph Ten (10) below but not more than three (3) leagues seaward of the coastline referred to in Paragraph One (1) above.

6. As against the State of Florida and all persons claiming under it, the United States has exclusive rights to explore and exploit the natural resources of the continental shelf lying seaward of the areas described in Paragraphs Four (4) and Five (5) above.

7. For the purposes of this litigation, there is no juridical bay between the upper Florida Keys and the Florida mainland (an area commonly referred to as "Florida Bay") whose closing line affects the seaward limit of Florida's Submerged Lands Act grant.

8. For the purposes of this litigation, the narrow waters within the lower Florida Keys from Money Key to Key West, the Marquesas Keys, and the Dry Tortugas Islands are generally territorial seas and not inland waters.

9. For the purposes of this litigation, there are no inland waters within the lower Florida Keys from Money Key to Key West, the Marquesas Keys, or the Dry Tortugas Islands whose closing lines affect the seaward limit of Florida's Submerged Lands Act grant.

10. Evidence has been introduced in hearings before the Special Master in this case which indicates that the Gulf Coast of Florida is a low-energy coastline and is likely to have undergone few significant changes since 1868. The parties therefore stipulate, for purposes of mea-

suring the area of Florida's Submerged Lands Act grant as described in Paragraph Five (5) above, that the charts constructed from information acquired through the joint state/federal mapping project presently being conducted will be deemed to depict accurately the location of Florida's 1868 coastline. Florida's Submerged Lands Act grant in the Gulf of Mexico therefore extends a maximum of three (3) marine leagues from the low-water line as shown on those charts and the seaward limits of inland waters as such waters would have been defined under principles employed by the United States in 1868.

[*sgd.*] Robert L. Shevin
ROBERT L. SHEVIN
Attorney General
State of Florida

[*sgd.*] Robert H. Bork
ROBERT H. BORK
Solicitor General
United States of America

Dated: December 11, 1975